

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION



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DECISIONS

02-04-85	UMWA/Rowe, et.al. v. Peabody Coal Co.	KENT 82-103-D
02-04-85	Youghiogheny & Ohio Coal Company	LAKE 83-86
02-13-85	Old Ben Coal Company	LAKE 83-50-R

Administrative Law Judge Decisions

02-01-85	Zeigler Coal Company	LAKE 84-106
02-01-85	Creole Mining, Inc.	WEST 81-338-M
02-12-85	John C. Gross v. Leeco, Inc.	KENT 83-283-D
02-12-85	Peabody Coal Company	CENT 84-39
02-13-85	Monument Mining Corporation	WEVA 84-353-R
02-13-85	MSHA/Sam Griffith v. Bowman Coal Co., Inc.	VA 84-25-D
02-15-85	UMWA v. Pine Tree Coal Company	WEVA 84-65-C
02-15-85	Fair Chance Mines, Inc.	WEST 82-204-M
02-19-85	W R W Corporation	KENT 83-39
02-22-85	Jim Walter Resources, Inc.	SE 83-51
02-25-85	Mitch Coal Company, Inc.	KENT 84-27
02-25-85	U.S. Borax & Chemical Corporation	WEST 82-144-RM
02-26-85	Robert Simpson v. Kenta Energy, Inc.	KENT 83-155-D
02-27-85	Specialty Sand Co., Inc.	CENT 84-26-M
02-27-85	Western Rock Products Corp.	WEST 84-49-M
02-27-85	Western Rock Products Corp.	WEST 84-50-M
02-27-85	Western Rock Products Corp.	WEST 84-51-M
02-27-85	Western Rock Products Corp.	WEST 84-54-M
02-28-85	Marion Adams v. J.L. Owens, III Contr., a/k/a Eastern Aggregates, Inc.	YORK 84-15-DM

review was denied in the following case during the month of February:

Secretary of Labor, MSHA on behalf of Larry Duty v. West Virginia Rebel Coal Company, Docket No. KENT 83-161-D, KENT 83-232-D. (Judge Broderick, January 18, 1985).

COMMISSION DECISIONS

UNITED MINE WORKERS OF AMERICA
(UMWA)
on behalf of
JAMES ROWE, et. al.,
JERRY D. MOORE
and
LARRY D. KESSINGER

v.

PEABODY COAL COMPANY

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
on behalf of
THOMAS L. WILLIAMS

v.

PEABODY COAL COMPANY

Docket Nos. KENT 82-103-D
KENT 82-105-D
KENT 82-106-D

Docket No. LAKE 83-69-D

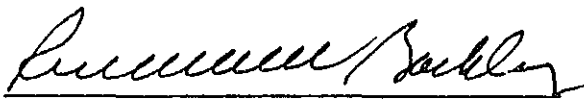
ORDER

On December 27, 1984, the Secretary of Labor filed a motion with the Commission to dismiss or vacate a portion of the direction for review in these consolidated discrimination cases. The Secretary's motion states that respondent Peabody Coal Company ("Peabody") and Thomas L. Williams, the individual complainant in Docket No. LAKE 83-69-D, have entered into a written agreement settling the issue of Peabody's liability to Mr. Williams for monetary damages. A copy of the signed settlement agreement is appended to the Secretary's motion.

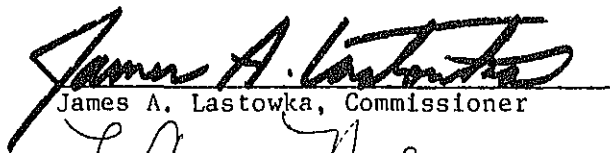
The settlement agreement recites that it "does not constitute an admission by Peabody of any violation of section 105(c) of the Federal Mine Safety and Health Act of 1977." The Secretary requests that the Commission dismiss or vacate only that portion of the direction for review in Docket No. LAKE 83-69-D pertaining to Peabody's liability for damages to Mr. Williams. The Secretary emphasizes that the granting of his motion would not affect Commission consideration of the other issues presented in this docket--namely, whether a violation of section 105(c) of the Mine Act occurred and, if so, the appropriate civil penalty to be assessed.

January 9, 1985, ordered Peabody to file a response to the Secretary's motion. On January 18, 1985, Peabody filed its response. Peabody indicates that it joins in the Secretary's request to vacate the direction for review "so as to indicate that the issues involving Respondent's liability to Mr. Williams for damages ... have been settled and are no longer the subject of review."

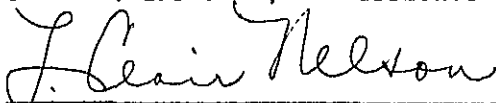
Upon consideration of the Secretary's motion, Peabody's response thereto, and the underlying settlement agreement, we grant the Secretary's motion. The direction for review in Docket No. LAKE 83-69-D is dismissed and vacated only insofar as it pertains to the issue of Peabody's liability to Mr. Williams for monetary damages. The other issues presented in that docket are not affected by today's order, and remain for our review and decision.



Richard V. Backley, Acting Chairman



James A. Lastowka, Commissioner



L. Clair Nelson, Commissioner

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SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

YOUGHIOGHENY & OHIO COAL COMPANY

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Docket No. LAKE 83-36

DECISION

This civil penalty case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). The Secretary of Labor has filed a motion to dismiss the proceeding and to vacate the underlying citation alleging that Youghiogheny & Ohio Coal Company ("Y&O") violated 30 C.F.R. § 75.308, a methane control standard. 1/ Y does not oppose the motion. The Secretary filed the dismissal motion after we granted Y&O's petition for discretionary review of a Commission administrative law judge's decision concluding that Y&O had violated the standard. 5 FMSHRC 1581 (September 1983)(ALJ). For the reasons that follow, we grant the Secretary's motion.

1/ 30 C.F.R. § 75.308, entitled "Methane accumulations in face areas is identical to section 303(h)(2) of the Mine Act, 30 U.S.C. § 863(h)(2) and provides:

If at any time the air at any working place, when tested at a point not less than 12 inches from the roof, face, or rib, contains 1.0 volume per centum or more of methane, changes or adjustments shall be made at once in the ventilation in such mine so that such air shall contain less than 1.0 volume per centum of methane. While such changes or adjustments are underway and until they have been achieved, power to electric face equipment located in such place shall be cut off, no other work shall be permitted in such place, and due precautions shall be carried out under the direction of the operator or his agent so as not to endanger other areas of the mine. If at any time such air contains 1.5 volume per centum or more of methane, all persons, except those referred to in section 104(c) of the Act, shall be withdrawn from the area of the mine endangered thereby to a safe area, and all electric power shall be cut off from the endangered area of the mine, until the air in such working place shall contain less than 1.0 volume per centum of methane.

violation of section 75.308, was issued by the inspector after he took a methanometer test showing a 5% level of methane in the E entry, an area immediately adjacent to the main working section.

The inspector had arrived on the main working section during the day shift about 9:00 a.m., and had issued the withdrawal order at 10:40 a.m. Following a roof fall in the E entry during the previous shift, Y&O had abandoned the E entry and dangled it off shortly before the inspector's actions. Because of the abandonment, Y&O had begun cutting coal in the crosscut approximately 40 feet from the E entry. To provide air to the face of the new mining area, an auxiliary fan was employed. Use of the auxiliary fan required extending the fan tubing into the crosscut. The inspector testified that the position of the auxiliary fan and the extended tubing caused air to bypass the E entry, permitting methane to accumulate in the entry.

The section foreman had taken a methane reading in the E entry at the beginning of the day shift, about 8:40-8:45 a.m., before turning on the power in the section. He testified that at that time the methane level was below 1%, and that he had found everything normal except for the roof fall. Some 20 minutes or more before the inspector's methanometer test, the foreman had also taken a second methane reading in the E entry, showing a methane level of .2%.

In addition to the methanometer reading, the inspector took an air sample, a more accurate measure of the concentration of methane. After laboratory analysis, the air sample showed a methane level of 6.34%. The inspector testified that the methane level in the E entry was potentially explosive, and could cause death or serious injury. Nelms is a gassy mine with a history of previous ignitions and is on a five-day inspection cycle pursuant to section 103(i) of the Mine Act. 30 U.S.C. § 813(i).

At the time the inspector found the excessive methane concentration, the electrical equipment--the continuous miner, the shuttle cars, and the auxiliary fan--was operating and eleven miners were working in the section. Upon issuance of the withdrawal order, the operator immediately turned off the fan and the continuous miner, stopped mining operations, removed all miners from the affected area, except those needed to abate the hazardous condition, and took precautions not to endanger other areas of the mine. The inspector terminated the citation at 11:50 a.m. after the operator had reduced the methane level below .1%.

The only issue litigated by the parties below and considered by the judge was whether Y&O had violated section 75.308. The operator did not challenge either the existence of an excessive level of methane or the presence of an imminent danger. Y&O argued that section 75.308 requires an operator to take specific remedial actions once concentrations of 1

regardless of whether Y&O had taken the actions required by section 75.308 upon the discovery of excessive methane, Y&O violated the standard because its foreman had inadequately monitored for methane and the miner negligently allowed the methane to accumulate to an explosive level.

The administrative law judge concluded that Y&O's failure to take "necessary and reasonable steps to control and dissipate methane concentrations before they reached the explosive range" constituted a violation of section 75.308. 5 FMSHRC at 1584 (emphasis in original). The judge reasoned that because Congress intended to prevent methane accumulation, it was "not enough that a mine operator take steps to eliminate methane levels of methane after they are found by an inspector and a warning order is issued." 5 FMSHRC at 1585 (emphasis in original). In the judge's view, the presence of certain conditions--either alone or in combination--require an operator to take extra precautions to prevent methane from reaching explosive levels: (1) if a mine liberates methane; (2) if there is a recent roof fall; or (3) if there is an abandoned area near the working face. Id. The judge found that these factors were present at the time of the citation, that Y&O was aware of them, and that Y&O knew or should have known that the placement of the fan and tubing would short-circuit the air to the abandoned entry. Id. Based on these findings, the judge concluded that Y&O's failure to take necessary and reasonable steps "to assure that there would not be a methane buildup in entry E" constituted a violation of the standard. 5 FMSHRC at 1585-86. The judge also found that the foreman checked for methane at the beginning of the shift, and once again some 20 minutes before the inspector arrived, when he found a concentration of about .2%. 5 FMSHRC at 1582.

The Secretary's motion to dismiss the proceeding and to vacate the citation asserts that on the facts as found by the judge "no violation of 30 C.F.R. § 75.308 can be proved." The Secretary states that the judge found that [the foreman] had checked the methane concentration in the affected area only 20 minutes before the inspector performed the test," and that there is "probably sufficient evidence in the record to support [this finding.]" The Secretary does not, however, set forth its position with respect to the judge's interpretation of the standard. The conditions existed which required Y&O to take extra precautions to prevent methane from reaching explosive levels and that when Y&O failed to take these precautions and methane reached explosive levels, it violated the standard. 2/

2/ The Secretary asserts, however, that in his view the evidence has established a violation of 30 C.F.R. § 75.301 (requiring operators to maintain a "volume and velocity of air ... sufficient to ... render the atmosphere harmless and ... carry away ... harmful gases") and, possibly, of 30 C.F.R. § 75.316 as well (requiring operators to comply with their ventilation plans), but that it is too late in this proceeding to raise the citation to allege such violations. Sec'y Mem. at 5.

case is terminated, or continued, in accordance with the Act. Climax Molybdenum Co., 2 FMSHRC 2748, 2750-51 (October 1980), aff'd sub nom. Climax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447 (10th Cir. 1983). For that reason, we do not automatically grant motions to vacate citations that have been contested and thereby placed before the Commission for decision. See 30 U.S.C. § 815(d). Such motions are granted only where adequate reasons to do so are present. Kocher Coal Co., 4 FMSHRC 2123, 2124 (December 1982).


We conclude that adequate reasons exist in the present case. First, there is no longer a true adversarial contest suitable for judicial resolution. The Secretary, who is charged by the Mine Act with the responsibility of prosecuting civil penalty actions, has by his motion indicated that he no longer wishes to participate actively as a party. Further, the Secretary has not informed us as to what, in his view, is required for compliance with the standard. The failure of the Secretary in this regard is significant. Section 75.308 is one of a series of standards, critical to mine safety, aimed at methane detection and control. To construe this important standard without adversarial argument and without benefit of the views of the party charged with its enforcement would be contrary to principles of sound judicial administration. See Climax Molybdenum Co. v. Secretary, 703 F.2d at 451-52.

Second, Y&O did not respond to the Secretary's motion to dismiss this proceeding. Y&O could have repeated its request for a decision on the merits. We interpret Y&O's silence as acquiescence in the Secretary's motion. Nor has Y&O requested declaratory relief pursuant to section 105(d) of the Mine Act, 30 U.S.C. § 815(d), and section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554(e), asserting that it faces a continuing legal dilemma in being forced to act at its peril absent an interpretation of section 75.308. Cf. Climax Molybdenum, 2 FMSHRC at 2752-53; and Climax Molybdenum Co. v. Secretary, 703 F.2d at 452-53.

Third, even in the face of the Secretary's motion to vacate and Y&O's silence, we could decide this case on the merits if, in our view, the public interest demanded such a course. However, no third party asserts, and it does not otherwise appear from our review of the record, that such action is necessary in this case. Rather, the Secretary's motion appears to be based upon a bona fide belief that he lacks the evidence to prove a violation and perhaps upon confusion as to the proper standard under which to proceed in the circumstances presented.

Finally, vacation of the underlying citation requires vacation of the judge's decision affirming the citation. Thus, dismissal of this proceeding will not prejudice Y&O, because the vacation of the citation and the judge's decision will expunge the violation and the penalty, and negate the possibility that the violation charged will become part of its history of previous violations. In short, no prejudicial collateral

granted. The citation contained in the order of withdrawal alleging a violation of section 75.308 is vacated, as is the judge's decision, and the civil penalty proceeding is dismissed.


Richard V. Backley, Acting Chairman


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

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SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

OLD BEN COAL COMPANY

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Docket No. LAKE 83-50-R

DECISION

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). The question presented is whether an operator that has contested the allegation of violation in citation is precluded from pursuing that contest by choosing to pay the civil penalty subsequently proposed for the violation. The Commission administrative law judge concluded that, under the circumstances of the case, Old Ben Coal Company's payment of the proposed penalty extinguishes its right to continue its previously filed contest of the citation. On the bases explained below, we affirm.

On January 31, 1983, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Old Ben a citation alleging that it had violated 30 C.F.R. § 77.1401, a mandatory safety standard, by hoisting men with a crane that had an inoperable overwind device. 1/ Old Ben abated the alleged violation within the time required by the inspector.

1/ 30 C.F.R. § 77.1401, entitled "Automatic controls and brakes," provides:

Hoists and elevators shall be equipped with overspeed, overwind, and automatic stop controls and with brakes capable of stopping the elevator when fully loaded.

of 30 C.F.R. § 77.1401. The parties submitted the case to the administrative law judge on the basis of stipulated facts and legal hearing was held.

On March 23, 1983, pursuant to sections 105(a) and 110(a) Mine Act, MSHA's Office of Assessments mailed to Old Ben a not proposed assessment of civil penalties for four violations, in the violation at issue here. 3/ A penalty of \$192 was proposed for Ben's alleged violation of 30 C.F.R. § 77.1401.

2/ Section 105(d) states in part:

If, within 30 days of receipt thereof, an operator of a mine notifies the Secretary that he intends to contest the issuance of an order issued under section [104], or citation or assessment of proposed assessment of a penalty issued under [section 105(a) or (b) ...], or the reasonableness of the length of abatement fixed in a citation ... issued under section [104], the Secretary shall immediately advise the Commission of such notification. The Commission shall afford an opportunity for a hearing. Thereafter shall issue an order ... affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief.

30 U.S.C. § 815(d).

3/ Section 105(a) states in part:

If, after an inspection or investigation, the Secretary issues a citation or order under section [104], he shall, within 30 days after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty to be assessed under section [110(a)] for the violation of the Act that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. ... If, within 30 days from the receipt of the citation issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, ... the citation and the proposed assessment shall be deemed a final order of the Commission and not subject to review by any court or agency.

30 U.S.C. § 815(a).

Section 110(a) states in part:

The operator of a ... mine in which a violation occurs of a mandatory health or safety standard ... shall be assessed a civil penalty by the Secretary which penalty shall not be more than ...

voucher...." (emphasis added). The voucher also read, in part, "In full payment and settlement of the following violations: ... [30 C.F.R. §] 77.1401." Subsequently, on May 12, 1983, the Secretary filed a motion to dismiss Old Ben's contest of the citation. Noting that the civil penalty proposed for the alleged violation had been paid in full, the Secretary's motion stated that "such payment of civil penalty moots the notice of contest and constitutes an admission by the [c]ontestant that the conditions alleged in the citation [constituted] a violation... Secretary's Motion 1.

In granting the Secretary's motion, the judge relied primarily on section 105(a) of the Mine Act. The judge reasoned that section 105(a) "clearly states that if no formal protest is made of the issuance of the proposed assessment 'the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review' Slip op. at 2 (August 30, 1983) (ALJ) (unpublished decision) (emphasis in original). The judge concluded that Old Ben's right to have the citation at issue reviewed on the merits was "forfeited" when it failed to contest the Secretary's proposed penalty assessment within the 30-day period provided by section 105(a). Id. 4/ Accordingly, the judge granted the Secretary's motion and dismissed the proceeding.

On review, Old Ben argues that section 105(d) of the Mine Act grants operators an immediate right to contest a citation and the right to continue that contest regardless of a later payment of the subsequently proposed penalty. Thus, according to Old Ben, an operator that has contested a citation pursuant to section 105(d) can choose not to contest the proposed penalty, but pay the penalty and continue to pursue its contest of the citation. The Secretary responds that an operator cannot continue its contest of a citation if it pays a proposed penalty. The Secretary argues that payment of a proposed penalty is an admission of the cited violation underlying the penalty. Like the judge, the Secretary relies heavily on the language in section 105(a) of the Act that failure to contest the penalty proposed for the cited violation results in the citation and penalty being "deemed a final order of the Commission ... not subject to review by any court or agency."

In Energy Fuels Corporation, 1 FMSHRC 299 (May 1979), the Commission held that section 105(d) of the Mine Act permits a mine operator to contest an abated citation before the Secretary proposes a penalty for the violation. We recognized that an operator would, in some circumstances, need an immediate hearing with respect to a citation. 1 FMSHRC at 307-09. Analyzing the language of section 105(d) and its relationship

4/ The judge declined to hold that in all circumstances an operator's notice of contest becomes "moot" because a proposed penalty is paid in full. He intimated that if Old Ben had paid the penalty by "mistake," he might have "ruled otherwise". Slip op. at 1.

hearing on its citation is exercised in a manner wholly divorced from its response to the Secretary's subsequent proposal of a penalty for the cited violation. To the contrary, our decision in Energy Fuels clearly reflects our expectation that an aggrieved operator must also follow the statutory scheme set forth in section 105(a):

Even if [the operator] were to immediately contest all of a citation but lacked an urgent need for a hearing, we see no reason why the contest of the citation could not be placed on the Commission's docket but simply continued until the penalty is proposed, contested, and ripe for hearing. The two contests could then be easily consolidated for hearing upon motion of a party or the Commission's or the administrative law judge's own motion.

Energy Fuels, supra, 1 FMSHRC at 308 (emphasis added). The focus of our concern in Energy Fuels was whether a citation could be contested prior to the proposal of a penalty. The present case poses the further question of whether a contest of a citation can continue after the operator has decided not to challenge the proposed penalty. As the language quoted above indicates, Energy Fuels anticipated this question by contemplating the institution of two separate contests with their subsequent consolidation in most circumstances.

Old Ben's suggested severance of the two contests runs directly contrary to the administrative scheme of the Mine Act described in and successfully followed since Energy Fuels, and set forth in the Commission's rules of procedure. Commission Procedural Rules 20 and 22 permit, but do not require, an operator to contest a citation at the time of its issuance. 29 C.F.R. §§ 2700.20 & .22. Rules 25 and 26, however, require that a notification of proposed assessment of penalty be contested within 30 days of receipt of the notification. 29 C.F.R. §§ 2700.25 & .26. Further, Old Ben's suggestion of severance undercuts the Mine Act's enforcement scheme. The allegation of a violation contained in a citation is an initial step in the enforcement of the Mine Act and of its mandatory safety and health standards. The Act requires that the Secretary propose and the Commission assess an appropriate civil penalty for a violation. See generally Sellersburg Stone Co., 5 FMSHRC 287, 290-94 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984); U.S. Steel Mining Co., Inc., 6 FMSHRC 1148, 1149-50 (May 1984); Tazco, Inc., 3 FMSHRC 1895, 1896-98 (August 1981). The validity of the allegation of violation, and of any special findings made in connection with the alleged violation, all bear upon the appropriate penalty to be proposed by the Secretary prior to adjudication and to be assessed by the Commission if a violation is ultimately found. The Act requires that the penalty reflect the facts surrounding the violation and correlate with the nature of the violation through consideration of the statutory

Moreover, under section 105(a) of the Mine Act, an uncontested proposed penalty becomes "a final order of the Commission ... not subject to review by any court or agency." (Emphasis added.) If an operator were permitted to continue its contest of a citation following its payment of the proposed penalty, the Commission would be foreclosed from considering the penalty amount because under the very words of the statute the Commission's jurisdiction would be divested by the operator's failure to contest the proposed penalty within the time specified. The Commission would thereby be deprived of its power to assess penalties in accordance with section 110(i) of the Act.

Finally, as we have repeatedly emphasized in our cases, a penalty under the Mine Act is predicated upon the existence of a violation. See, e.g., Tazco, Inc., supra, 3 FMSHRC at 1896-98; Co-op Mining Co., 2 FMSHRC 3475, 3475-76 (December 1980). Therefore, an operator cannot deny the existence of a violation for purposes connected with the Mine Act and at the same time pay a civil penalty. For purposes of the Act, paid penalties that have become final orders reflect violations of the Act and the assertion of violation contained in the citation is regarded as true. See generally Amax Lead Co. of Missouri, 4 FMSHRC 975, 977-80 (June 1982).

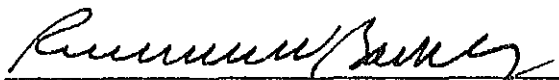
Therefore, in view of the language of sections 105(a) and 105(d), and Congress' intent to tie penalties to the particular facts surrounding a violation, we hold that the fact of violation cannot continue to be contested once the penalty proposed for the violation has been paid. Our holding imposes no burden on operators that have immediately contested a citation. If there is a "burden," it comes from the statute. Old Ben's right to a hearing on its notice of contest would have remained, provided that it had merely indicated within 30 days of receipt of the

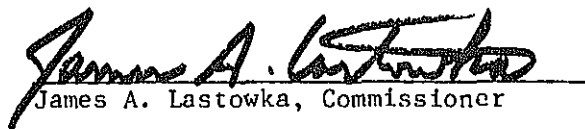
5/ Section 110(i) of the Act provides:

The Commission shall have authority to assess all civil penalties provided in this [Act]. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this [Act], the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

operator to contest the subsequently proposed civil penalty if it wishes a hearing on that issue. In this regard, there has been no departure from procedures followed under the 1969 Coal Act, 30 U.S.C. § 801 et seq. (1976)(amended 1977).

For the foregoing reasons, we affirm the judge's dismissal of Old Ben's notice of contest. 7/


Richard V. Backley, Acting Chairman


James A. Lastowka, Commissioner

6/ Old Ben did not claim below or argue to us that the penalty was paid by error. In fact, the transmitted documents from Old Ben's legal department indicate that payment of the penalty while its contest of the citation was pending was a deliberate decision. Like the judge, we might rule differently in a case where a penalty was paid by genuine mistake. See note 4, supra.

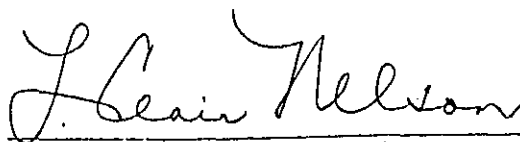
7/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise "all of the powers of the Commission."

...ituted an admission of the violation for purposes of Mine Act proceedings and thereby mooted its contest of the citation in this proceeding.

Also, while I agree that an operator cannot pay the penalty proposed by the Secretary and thereafter maintain before the Commission its challenge to the underlying citation, I do not share the view that absent such a payment, an operator must file a notice of contest of the Secretary's subsequently proposed civil penalty in order to continue to press its earlier filed challenge to the underlying citation. Under that scheme, an operator must separately contest the penalty proposed by the Secretary or face an absolute forfeiture of its right to contest the underlying citation.

Requiring the operator to formally contest the Secretary's penalty proposal where the operator has contested the underlying citation does not enhance or advance the proceeding inasmuch as the Commission judge, should he find a violation of the Mine Act, will assess a penalty on the basis of the record evidence and the section 110(i) penalty criteria (30 U.S.C. §820) and not on the basis of the Secretary's proposed penalty. Thus, in a case where the Commission's jurisdiction rests upon the operator's contest of a citation, the Commission judge will assess any penalty on a de novo basis. Accordingly, I do not perceive a need to require the operator to contest any penalty proposed by the Secretary when the operator's earlier filed notice of contest of the underlying citation necessarily places the penalty amount in issue. In that regard, at the administrative hearing on the validity of the citation, the Secretary will have the opportunity to introduce evidence as to the appropriate penalty and the operator will have the opportunity to rebut that penalty-related evidence. The judge then will independently assess any penalty.

Finally, although today's holding imposes no undue burden on operators that have contested a citation pursuant to section 105(d), placing an additional filing burden upon mine operators (as well as this Commission) appears without benefit or statutory requirement. Instead, as stated above, I believe that where an operator contests a citation, that operator need not file a separate notice of contest in response to the Secretary's subsequent penalty proposal. In such an event, the Secretary's proposed penalty is but part of the case involving the contest of the underlying citation. At the administrative hearing, the Secretary may introduce evidence establishing both the fact of the violation and the appropriate penalty to be assessed by the presiding Commission judge. The operator, in turn, may seek to rebut some or all of the Secretary's case. I believe that the proposed procedure is consistent with the Mine Act and procedurally efficient.



L. Clair Nelson, Commissioner

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Administrative Law Judge Charles C. Moore
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

ADMINISTRATIVE LAW JUDGE DECISIONS

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 84-106
Petitioner	:	A.C. No. 11-01845-03554
v.	:	
	:	Zeigler No. 5 Mine
EIGLER COAL COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

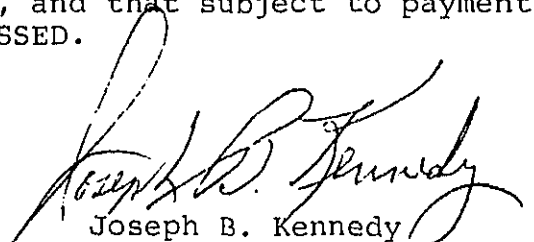
Before: Judge Kennedy

This matter is before me on the parties' motion to approve settlement of the captioned matter.

The penalties initially assessed amounted to \$130 each for (1) a permissibility violation that could have resulted in a fire or explosion and (2) an electrical maintenance violation that could have caused an electrical shock of unspecified, but obviously lethal, severity. Both violations were the result of run-of-the-mine negligence, i.e., negligence that repeatedly recurs. Despite the gravity and negligence involved, MSHA rewarded the operator with a 10% discount for prompt abatement. This resulted in a net penalty of \$91 each for the violations charged.

Based on an independent evaluation and de novo review of the circumstances, I find the discount for prompt abatement excessive and serve notice that in the future I may feel compelled to deny settlements where the formula discount is awarded without proper regard for the gravity and negligence involved in serious violations. For this case, however, I find the settlement proposed acceptable.

Accordingly, it is ORDERED that the motion be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the amount of the settlement agreed upon, \$182, on or before Friday, February 15, 1985, and that subject to payment the captioned matter be DISMISSED.


Joseph B. Kennedy
Administrative Law Judge

of Labor, 230 South Dearborn Street, Chicago, IL 60604
(Certified Mail)

J. Halbert Woods, Esq., Zeigler Coal Company, 2700 River
Road, Suite 400, Des Plaines, IL 60018 (Certified Mail)

/ejp

MINE SAFETY AND HEALTH	:	Docket No. WEST 81-338-M
ADMINISTRATION (MSHA),	:	A.C. No. 42-01708-05002
Petitioner	:	
	:	
v.	:	Little Joe Mine
	:	
CREOLE MINING, INC.,	:	
Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
No appearance for Respondent.

Before: Judge Vail

STATEMENT OF THE CASE

This civil penalty proceeding was filed by the Secretary Labor (Secretary) against Creole Mining, Inc., respondent, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for three alleged violations of mandatory safety standards. Respondent failed to timely answer the Secretary's petition for proposal for a penalty in this case. However, following the issuance of an order to show cause why it should not be placed in default, respondent replied by letter which was accepted as its answer. In that letter, Mark Truman related he was replying for his father Karl I. Truman, owner, under a power of attorney, his father was on a L.D.S. Mission overseas.

A notice of hearing was mailed to the parties on January 1984, setting the hearing for April 3, 1984, in Salt Lake City, Utah. The undersigned was notified that a settlement agreement had been reached between the parties and the hearing was cancelled. On April 23, 1984, counsel for the Secretary, mailed a stipulation and motion to approve the settlement agreement along with an order to Mark Truman for the respondent and requested he sign the necessary papers and forward them for approval. On May 21, 1984, a letter was sent to Mark Truman requesting he either sign the stipulation and forward it, or indicate his reason for not doing so. Also, if he did not wish to sign, the case would be reset for hearing.

proceed. Respondent's representative failed to appear. After waiting for a period of time, counsel for the Secretary advised the undersigned that he had a witness present and wished to proceed with the hearing and present evidence. This motion was granted.

On August 2, 1984, an order was issued and sent to the respondent to show cause why he should not be held in default for failure to appear at the hearing and have penalties assessed against him. Karl I. Truman replied by letter dated August 13, 1984 wherein he stated he had originally paid a fine of \$1,000.00, that he was contacted again and after several telephone calls, filled out some papers, paid a fee and considered the matter of the Little Joe Mine resolved.

ISSUES

The issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties filed in this proceeding, (2) whether respondent defaulted in its failure to appear at the hearing set for July 31, 1984; and if so, (3) the appropriate civil penalty that should be assessed against respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act.

At the hearing, James H. Barkley, counsel for the Secretary stated that prior to the hearing, he had attempted to contact Karl Truman on several occasions regarding returning the proposed settlement agreement. Messages were taken on Truman's telephone which was located at either his business or residence which appeared to be one and the same. Truman never returned Mr. Barkley's telephone calls. Then when the hearing was rescheduled, Mr. Barkley called again and left the message that the hearing was being set because he did not return the settlement papers and that if he would sign the papers and send them back it was assumed the Court would entertain a motion for a continuance. Mr. Barkley believed the telephone conversation was with Mr. Truman's wife. There was no reply from Mr. Truman (Tr. at pages 4, 5).

Based upon the above representations by counsel for the Secretary, failure on the part of respondent to communicate with the undersigned, and failure to receive any document other than

The evidence shows that on October 23, 1980, an accident occurred in the Little Joe Mine located approximately 50 miles of Green River, Utah. An explosion occurred in the mine owing a misfire resulting in a serious eye injury to a miner. Citations were issued by the Secretary for operator's violation of mandatory safety standards in allowing men to return to fired holes in the heading in less than 30 minutes (Tr. at Respondent paid penalty assessments of \$500.00 each for a total of \$1,000.00.

As a result of the above accident, respondent was issued additional citations during an accident investigation on November 5, 1980. These three citations were termed technical violations by the issuing inspector Kenneth Joslin. Citation No. 576610 issued as section 104(a) type violation of 30 C.F.R. § 57.26-1 alleged that the operator of the Little Joe Mine failed to file a Form 2000-7 with the Mine Safety and Health Administration. Citation No. 576610 issued as type 104(a) violation of 30 C.F.R. § 57.26-1 alleged the operator failed to notify the nearest Sub-district office of Mine Safety and Health Administration about the opening of the Little Joe Mine. Citation No. 576612 issued as type 104(a) violation of 30 C.F.R. § 50.10 alleged that the operator did not immediately notify the Mine Safety and Health Administration of a blasting accident occurring on October 23, 1980 at the Little Joe Mine.

Inspector Kenneth Joslin testified that on November 5, 1980, he performed an investigation at the Little Joe Mine of the above accident. In a conversation with Eldred M. Garrick, respondent's geologist, he determined that a misfire occurred in the mine on October 23, 1980 as a result of the primer going off without the ammonium nitrate in the hole not firing. As a result, a miner was injured when he approached the face and the prior round was fired (Tr. at 7, 8). Based on the evidence of record, Mine Safety and Health Administration was not notified of the accident immediately thereafter. Also, the operator of the Little Joe Mine had failed to notify the MSHA Sub-district office at Moab, Utah, and also failed to file the required Form 2000-7 (Tr. at 10). I find that failure of the operator to perform the above acts are violations of mandatory safety standards of the

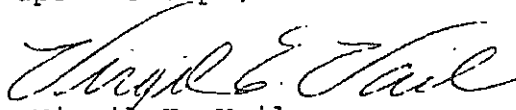
PENALTIES

The Secretary has proposed a penalty of \$36.00 be assessed for each of the three violations in this case. Respondent initially contested these violations in his letter (Answer)

Therefore is issued in the letter
these citations were "taken care of" as alleged in the letter
signed by Karl I. Truman and dated August 31, 1984. Therefore, I
and that the proposed penalty of \$36.00 for each violation in
is case or a total sum of \$108.00 is reasonable and ap-
ppropriate.

ORDER

The respondent is ORDERED to pay civil penalties in the
total amount of \$108.00 within 40 days of the date of this
decision and order, and upon receipt, this case is dismissed.


Virgil E. Vail
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Office of the Solicitor, U.S. Department
of Labor, 1585 Federal Building, 1961 Stout Street, Denver,
Colorado 80294 (Certified Mail)

Karl Truman, Power of Attorney for Karl I. Truman, Creole Mining,
Co., P.O. Box 286, Minersville, Utah 84752 (Certified Mail)

lc

JOHN C. GROSS, : DISCRIMINATION PROCEEDING
Complainant :
 :
v. : Docket No. KENT 83-283-D
 :
 : BARB CD 83-30
LEEEO, INC., :
Respondent :

DECISION AND ORDER OF DISMISSAL

Appearances: John Lang, Esq., Bruce, Clarke and Lang,
London, Kentucky, for the Respondent.
John C. Gross, Yeaddiss, Kentucky, pro se,
Complainant.

Before: Judge Lasher

This proceeding, which was initiated by the filing with the Federal Mine Safety and Health Review Commission of a complaint of discrimination by John C. Gross on September 23, 1984, arises under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981), hereinafter "the Act."

By letter dated August 24, 1983, the Complainant had been notified that his complaint of discrimination, filed July 25, 1983, with the Mine Safety and Health Administration (MSHA) had been investigated and the determination made that a violation of section 105(c) had not occurred. Under the Act, a complaining miner has an independent right to bring a complaint before this Commission and this proceeding is based on that right.

On October 26, 1983, the Respondent filed a Motion to Dismiss on the grounds that the Complaint was not timely filed, i.e., not filed within the 60 day statutory time limit. Subsequently Respondent sought dismissal for the further reason that the Complaint fails to state a claim under the Act. A preliminary hearing to determine the two issues raised by the motion to dismiss was held on the record in Manchester, Kentucky on November 29, 1984, at which Respondent was represented by counsel and Complainant appeared pro se.

(Tr. 4,5.) There is no indication on the record that he previously had filed safety complaints with any governmental agency or made safety complaints to his employer. After his discharge he filed no complaints, grievances or actions other than that involved in this proceeding. Complainant is not a union member -- Leeco's employees are unrepresented. However Complainant lives in a community of 200 to 300 people and most of the working men living there are miners (Tr. 41, 42). Two of his brothers, Denton and Sylvan, were at the time of his discharge, coal miners for Blue Diamond Coal Company and are union members (Tr. 23, 43, 44). Sylvan lives near the Complainant. At the preliminary hearing Complainant, who was accompanied by brother Denton, was asked what he told his brother Sylvan about his discharge, leading to the following dialogue:

THE COURT: Did you talk to him about being discharged?

THE WITNESS: Well, I told him I got fired.

THE COURT: Did you tell him why?

THE WITNESS: Yeah.

THE COURT: What did you tell him?

THE WITNESS: Well, I told him just how everything happened, you know; the brakes went out on the truck, the fuel stuck, and hit the beltline and got out to check the truck, and they fired me.

(Tr. 44.)

The termination slip which was handed to Complainant by his foreman, Kenneth Haskins, on September 20, 1982, charged as follows:

Name, John Gross; Company, Leeco; Date of Termination, 9/20/82; Department or Mine, 31; Reason for Termination, abuse equipment, run truck into the tunnel belt.

he was fired for abuse of equipment." (The truck ran into the belt line.)

Note: The complainant was not aware of the 60 day time limit on filing a discrimination complaint.

It should be initially noted that Respondent has neither alleged or established any specific prejudice it suffered as a result of the filing delay. 1/

With respect to any justification for the filing delay, Complainant gave the following explanations:

THE COURT: All right, Mr. Gross, why did you not file a Complaint before July 21, 1983, when you were discharged on September 20, 1982?

THE WITNESS: Well, I didn't know there was a time limit on it. And it kept bothering me, you know, to think that I had been done that way, just fired.

* * * * *

THE COURT: You said you didn't know there was a time limit?

THE WITNESS: Yes.

THE COURT: Okay.

THE WITNESS: And I kept talking to people, you know. And I didn't know where to go, you know, to file a Complaint.

1/ The question of whether general prejudice can be inferred from the fact of the passage of many months before a mine operator is put on notice that it must defend a claim of discrimination was not argued and is not dealt with in view of the decision ultimately reached.

THE WITNESS: Then I found out where to go to, to file this Complaint. And so I went ahead and filed it.

THE COURT: Okay; is there any other reason why there was a delay in your filing?

THE WITNESS: No.

(Tr. 11, 12.)

THE COURT: Okay. I'm not trying to put words in your mouth. You say yes, if you did.

Okay. You said specifically, as to who that you talked to after you were discharged, that you talked to Steve Lewis, Ronald Baker, and your family; right?

THE WITNESS: Yes.

THE COURT: Now when you say family, is that -- what? Who does that include?

THE WITNESS: Wife.

THE COURT: Anybody else? Father, brother, anybody like that?

THE WITNESS: Well, I talked to Mom and Dad, you know, about it. They didn't know nothing about it, either.

THE COURT: Okay. And did you talk to your brother, who's here today with you in the courtroom, about it?

THE WITNESS: No.

THE COURT: You didn't talk to him. What does he do for a living?

THE WITNESS: He's a underground miner.

THE WITNESS: Yes.

* * * * *

THE COURT: Okay. Was your father a miner?

THE WITNESS: No.

THE COURT: Is your brother in a union?

THE WITNESS: Yes.

THE COURT: What union does he belong to?

THE WITNESS: Southern Labor.

THE COURT: What?

THE WITNESS: Southern Labor.

(Tr. 23, 24.)

As to his efforts in attempting to learn of his rights, he testified as follows:

BY MR. LANG:

Q. Mr. Gross, if I understand your testimony, you were discharged from Leeco on or about September 20th, 1982; is that correct?

A. Yes.

Q. And you recall you -- the Judge showed you a copy of the Complaint which you filed in connection with that discharge; is that correct?

A. Yes.

Q. You just testified that you had an occasion to file a Discrimination Complaint with the Federal Mine Safety and Health, with MSHA, on or about July 21st, 1983; is that correct?

A. Yes.

is that correct?

A. Yes.

Q. Do you want to tell this Court why it took you 302 days to file the Complaint?

A. Well, I didn't know. And I kept talking to people. I didn't know where to file the Complaint at, didn't know how to go about it, didn't have money, laid off.

Q. Did you have an occasion to call an attorney to ask an attorney what the filing requirements would be?

A. Didn't have no phone.

Q. Did you have a quarter to go to a pay phone to call an attorney?

A. Well, the closest pay phone is Hyden, and that's 26 miles.

Q. So you did not have an occasion at any point in time for the 302 days, to call an attorney, to ask him what the filing requirements would be; is that correct? And that in the 302 days, you did not have occasion to get to a telephone to call an attorney?

A. Well, our attorneys in Leslie County, if you go in and talk to them, you pay them 10 or 12 dollars. I took a couple of letters in after I filed this, and they charged me \$10 to read the letter and tell me what it was about.

Q. Mr. Gross, if I understand your testimony, then, you made no effort to contact counsel in this 302-day period to attempt to ascertain what, if any, filing requirements there would be; is that correct?

A. No, I didn't speak to an attorney.

Q. Okay; so my question then, Mr. Gross, is during the 302-day period that elapsed from the time you were discharged and the time you filed your Complaint, you did not make any effort to contact an attorney, to ascertain what, if any, filing requirements there would be in connection with a Discrimination Complaint; is that correct?

A. No, I didn't contact an attorney.

Q. Okay. You testified that you spoke with some people to try to find out what, if any, requirements there was; what people are you referring to?

A. Friends.

Q. What are their names?

A. Well, Steve Lewis was one of them.

Q. Where does he live?

A. He lives on Big Fork.

Q. Big Fork? Is he any relation to you?

A. First cousin.

Q. What does Mr. Lewis do for a living?

A. He's a miner.

Q. What, if anything, did Mr. Lewis tell you?

A. Well he didn't know very much about it, he just -

Q. When did you contact Mr. Lewis in connection with this matter?

A. I don't remember what the date was.

Q. Well, do you recall whether or not it was immediately after you were discharged, or could

A. It might have been anywhere from two to three months.

Q. Who else, if anybody, did you speak to in connection with this matter?

A. Well, I talked to different people about it. Not nobody, you know, particular.

Q. I understand you spoke with different people. What I'm trying to find out is, who those people are. Their names, where do they live, what do they do for a living.

A. Well, I talked to Ronald Baker; he was the one that told me --

Q. Excuse me. Who?

A. Ronald Baker.

Q. Ronald Baker. Where does he live?

A. He lives on Baker Fork.

Q. Do you know what Mr. Baker does for a living?

A. He's a underground miner.

Q. What, if anything, did Mr. Baker tell you?

A. He told me to go to MSHA and file, at Hyden.

Q. Do you recall when that conversation took place?

A. It was a few days before I filed the case.

Q. That was the first time you spoke with Mr. Baker; is that correct?

A. ABout the discrimination, yes.

Q. Who else, if anybody, did you speak with in connection with this matter?

Q. Your immediate family?

A. Yes.

Q. Are you married?

A. Yes.

Q. You spoke with your wife?

A. We talked about it, you know, on how I'd been fired, you know, without a reason. I had a good work record. Drove a truck for six years. Never had no complaints, you know, about my work, driving.

Q. But you didn't speak to your wife or your family concerning what your rights would be, is that correct, insofar as filing an administrative complaint?

A. Well, we'd heard that, but we wasn't even sure that, you know, there was such a thing.

Q. You wouldn't expect your wife or family to know something like that, would you?

A. Yes.

r. 13-17.)

The complaint was filed with MSHA on July 21, 1983, r. 43), an interval of 10 months from his discharge and, consequently an 8 month filing delay. There being no question that it was not timely filed with the Secretary within the 60-day period prescribed in section 105(c)(2) of the Act, the question comes down to the existence of any justification for the delay. The Commission has held that the purpose of the 60-day time limit is to avoid stale claims but that a miner's late filing may be excused on the basis of "justifiable circumstances," Joseph W. Herman v. IMCO Services, 4 FMSHRC 35 (December 1982). The Mine Act's legislative history relevant to the 60-day time limit states:

While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a

rant the extension of the time-limit would include a case where the miner within the 60-day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act. S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978) (Emphasis added.). Timeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation. (Emphasis

Here, the filing delay is prolonged. Scrutiny of the entire record reveals that the essence of Complainant's excuse for the delayed filing is that he was unaware of his rights. However, Complainant has not asserted or established any specific justification for his ignorance or tardiness, only general allegations that he "didn't know where to file the Complaint, didn't know how to go about it, didn't have no money, (and was) laid off."

This is not a case (1) where the Complainant was misled as to his rights under the Act or the filing period, or (2) where he misunderstood such. He brought no other claims or complaints before other agencies, state or federal, which might have lulled him into a false sense of security, nor did he express any complaint or disagreement concerning abstract rights granted under the Act to his employer either at the time of his discharge or thereafter. He said he talked over his discharge with his wife and parents, but from all indications they obviously were not capable of advising him in a meaningful way. Inexplicably, he failed to discuss the matter with his brother, Denton, a miner and union member, who was working at a mine at the time of Complainant's discharge. There is no indication that he sought advice from any government agency, attorney, legal aid society or other informed person or agency wherein there would be any realistic chance to determine his rights or remedies within a reasonable period after his discharge. Nor did he indicate that he asked any friend or family member 2/ to seek advice or find out for him.

2/ Again, two of his brothers were employed as miners at the time and were union members

Is a miner who believes he has been discriminated against entitled to remain in long-term ignorance of his rights and remedies because of inaction, lack of initiative, or reasonable good-faith effort? I conclude that in the situation such as that involved here, where a miner's filing delay is not occasioned by a specific justification such as - or similar to those enumerated in the Act's legislative history, and is explained primarily by lack of knowledge of the rights provided for in the Act, there exists an obligation to make meaningful and good faith efforts to ascertain such rights. Such efforts should be of a nature to create a realistic opportunity for finding out one's rights, should commence within a reasonable time after the employer's alleged discriminatory action, and be continuing until the miner is informed one way or the other.

The 60-day statutory limitation is not a particularly long filing period in view of the lack of sophistication of the average Complainant and the complexity of some of the legal bases for bringing a discrimination action. On the other hand, the placement of limitations on the time-periods during which a plaintiff may institute legal proceedings is primarily designed to assure fairness to the opposing party by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. Here, the filing delay of 8 months is a lengthy one, no specific or clear justification therefor was shown, and there was no reasonable or meaningful effort on Complainant's part to ascertain his rights, or otherwise obtain assistance. Such mandates the conclusion that Complainant's delay in filing his complaint was not justified 3/ and that the complaint was not timely filed. 4/

3/ Cf. Walter A. Schulte v. Lizza Industries, Inc., 6 FMSHR (January 1984) (31-day delay).

4/ In view of this holding, the question of whether the complaint states a cause of action under the Act is not reached.

Michael A. Lasher Jr.
Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Mr. John C. Gross, Box 457, Yeaddis, KY 41777 (Certified M

Gene Clark, Esq., Reece, Clark & Lang, 304 Bridge Street,
Manchester, KY 40962 (Certified Mail)

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FEB 12 1985

DEPARTMENT OF LABOR, : CIVIL PENALTY PROCEEDING
SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 84-39
Petitioner : A.C. No. 23-00402-03505
v. :
: Power Surface Mine
COAL COMPANY, :
Respondent :

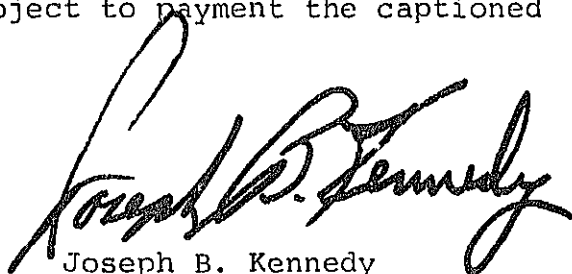
DECISION APPROVING SETTLEMENT

Judge Kennedy

This matter is before me on the parties' motion to
settlement of the captioned matter at the amount
ly assessed.

Based on an independent evaluation and de novo review
circumstances as set forth in the record of this
ing, I find the settlement proposed is in accord
the purposes and policy of the Act. Compare, United
Steel Corporation, 5 FMSHRC 954 (1982), appeal pending
Circuit.

Accordingly, it is ORDERED that the operator pay the
of the penalty agreed upon, \$241, on or before Friday,
, 1985, and that subject to payment the captioned
be DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

Attention:

S. Bass, Esq., Office of the Solicitor, U.S. Depart-
Labor, Rm. 2106, 911 Walnut St., Kansas City, MO
(Certified Mail)

L. Vaiden, Esq., Peabody Coal Company, P.O. Box 373,
is, MO 63166 (Certified Mail)

MONUMENT MINING CORPORATION, : CONTEST PROCEEDINGS
Contestant :
v. : Docket No. WEVA 84-353-R
: Order No. 2274263; 7/16/84
: SECRETARY OF LABOR, : Docket No. WEVA 84-354-R
MINE SAFETY AND HEALTH : Order No. 2274263-01; 7/17/84
ADMINISTRATION (MSHA), :
Respondent : Docket No. WEVA 84-355-R
: Order No. 2142667; 7/17/84
: Docket No. WEVA 84-356-R
: Order No. 2142668; 7/17/84
: Docket No. WEVA 84-374-R
: Order No. 2438645; 8/1/84
: No. 1 Surface Mine

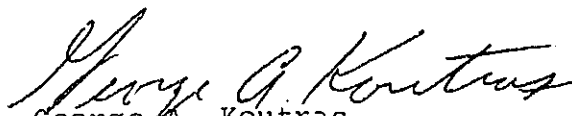
ORDER DISMISSING PROCEEDINGS

Before: Judge Koutras

The contestant has failed to respond to my previously issued orders and show cause orders directing it to furnish the name, address, and telephone number of its representative, and to advise me whether or not it wishes to pursue these contests further. In addition, the contestant has refused to accept service of said orders, and the postal service has returned the certified mailings as "unclaimed," "addressee unknown," or "postal box closed." Contestant's previously retained counsel has been dismissed on his own motion as the representative of the contestant on the ground that he is no longer authorized to represent the contestant in these proceedings.

In view of the foregoing, and in light of the contestant's failure to communicate further with this Commission with respect to the pursuit of the contests, these cases ARE DISMISSED, and the reasons for this action are (1) the contestant's failure to respond to the presiding Judge's order

Commission of any changes of representation, and (3) the
previous failure by the contestant to pursue its claims, or
otherwise explain why it is avoiding service of all further
communications in the proceedings.


George A. Koutras
Administrative Law Judge

istribution:

Monument Mining Corp., Box 618, Holden, WV 25625 (Certified Mail)

Nathan M. Kronheim, Esq., U.S. Department of Labor, Office
of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Valerie Rooney, Esq., U.S. Department of Labor, Office of
the Solicitor, 3535 Market St., Philadelphia, PA 19104
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Samuel Coyles, Representative of Miners, c/o Monument
Mining Corp., Box 618, Holden, WV 25625 (Certified Mail)

FEB 13 1985

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 84-25-D
ON BEHALF OF	:	MSHA Case No. NORT CD-84-3
SAMUEL E. GRIFFITH,	:	
Complainant	:	No. 2 Mine
v.	:	
	:	
BOWMAN COAL COMPANY, INC.,	:	
Respondent	:	

ORDER

Appearances: Mary K. Spencer, Esq., Office of the Solicitor
U.S. Department of Labor, Arlington, Virginia,
for Complainant;
Keary R. Williams, Esq., Williams & Gibson,
Grundy, Virginia, for Respondent.

Before: Judge Broderick

On January 14, 1985, I issued a decision on the merits in the above case in which I concluded that Complainant was discharged on February 21, 1984, as a result of activities protected under section 105(c) of the Mine Safety Act. I directed Complainant to submit a statement of the amount due as back wages together with interest, and allowed Respondent 10 days to respond to the statement.

On January 25, 1985, Complainant filed a statement of back wages and interest claimed through January 14, 1985. Respondent has not replied to the statement.

Pursuant to the findings and conclusions in my decision

Respondent IS ORDERED to pay Complainant back wages at the rate of \$50 per day from February 23, 1984 through April 25, 1984, in the gross amount of \$2,250 with interest thereon, at the rate of 11 percent per annum from February 23 1984 through December 31, 1984, and at the rate of 13 percent per annum from January 1, 1985 through January 14, 1985, for a total interest payment of \$172.91. The total amount due through January 14, 1985 is \$2,422.91.

ESS amount of back wages (\$2,250) at the rate of 13 percent
r year (.0361 percent per day) until paid.

Respondent is FURTHER ORDERED to pay the sum of \$100
thin 30 days of the date of this order as a civil penalty
r the violation of section 105(c) of the Act.


James A. Broderick
Administrative Law Judge

tribution:

ry K. Spencer, Esq., Office of the Solicitor, U.S.
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FEB 15 1985

LOCAL UNION 8454, DISTRICT 17 : COMPENSATION PROC
UNITED MINE WORKERS OF :
AMERICA (UMWA), : Docket No. WEVA 8
Complainants :
v. : No. 5 Mine
:
PINE TREE COAL COMPANY, :
Respondent :
and :
:
BUFFALO MINING COMPANY, an :
affiliate of THE PITTSTON :
COMPANY, a corporation :
Respondent :

DECISION

Appearances: Joyce A. Hanula, Legal Assistant, U
Washington, D.C. for Complainants;
Carter Elkins, Esq., and W. N. Reyn
Campbell, Woods, Bagley, Emerson, M
Herndon, Huntington, West Virginia
Respondent Pine Tree;
Donald R. Johnson, Esq., Lebanon, V
for Respondent Buffalo.

Before: Judge Broderick

STATEMENT OF THE CASE

The United Mine Workers Union Local 8454 (UMW) representing the miners employed at the Pine Tree Coal (Pine Tree) No. 5 Mine, brought this action against Pine Tree, claiming compensation for the miners who were a result of an order of withdrawal issued by MSHA on October 4, 1983. The withdrawal order was issued under section 107(a) of the Act, alleging an imminent danger because an active gas well was mined into in the mine. On March 6, 1984, Pine Tree filed a "Third Complaint" against Buffalo Mining Company (Buffalo) (1) that the condition resulting in the withdrawal was the result of Buffalo's failure to provide proper

services to Pine Tree, and (2) that Buffalo had agreed to indemnify Pine Tree for claims asserted against the latter with respect to matters related to the October 3, 1983, accident. Buffalo filed a Motion to Dismiss the Third Party Complaint. Complainants filed an amended Complainant naming Buffalo as an additional Respondent. All parties filed briefs and I denied the motion by order issued May 7, 1984.

Pursuant to notice, the case was called for hearing in Charleston, West Virginia, on December 20, 1984. Complainant did not call any witnesses. Gale B. Stepp testified on behalf of Pine Tree and Lenox Profitt testified on behalf of Buffalo. All parties have filed posthearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. The following miners were employed by Pine Tree at its No. 5 Mine in Logan County, West Virginia, on October 4, 1983. Each was idled as a result of the withdrawal order issued on that date. The rate of pay of each and the number of hours idled are listed beside each name:

<u>Miner</u>	<u>Hourly Rate</u>	<u>Hours Idled</u>
1. Mitchell Hensley	13.565	36
2. Michael Hensley	13.565	36
3. Bob Bryant	13.093	36
4. Woodrow Chambers	13.565	36
5. Steve Meade	13.565	36
6. Calvin Tomblin	13.565	36
7. Clifton Tomblin	13.565	36
8. Tim Adams	13.093	40
9. Billy Tomblin	12.57	40
10. Thomas Hensley	13.865	40
11. James Smith	13.460	40
12. Herbert Stramon	13.865	40
13. David Meade	13.460	40
14. Roger Adkins	12.87	40
15. Michael Bailey	12.97	32
16. Jim Gullett	12.97	32

2. Pine Tree operated the subject mine under a contract with Buffalo. Buffalo had a lease to the mineral rights on the mine property. In the contract, Buffalo is described as the owner and Pine Tree the contractor. Pine Tree agreed to mine coal and deliver it to Buffalo's tipple. Pine Tree

Buffalo agreed to furnish such engineering services as may in its judgment be required for contractor's guidance and to protect owner's interest in realty, in complying with the terms of this Contract. A reasonable charge will be made for such service, to be deducted from the proceeds due Contractor under this contract." Pine Tree was responsible for payment of its employees' wages and other benefits. Pine Tree agreed to comply with applicable State and Federal laws and regulations including those relating to health and safety. (Buffalo Exh. 1). The mine maps were furnished to Pine Tree by Buffalo. Pine Tree operated the mine with an MSHA ID number and a license from the State of West Virginia, both issued in the name of Pine Tree.

3. On October 3, 1983, at about 8:00 p.m., the mining crew told Gail Stepp, Pine Tree's President, that it had hit something which appeared to be a gas well. Stepp called Lenox Profitt, the contract manager for Buffalo. Profitt consulted the Buffalo engineering department and all available maps but found no indication of any gas well. Profitt told Stepp that there was no gas well in the area, so mining continued. The following morning, Stepp himself went in the mine and saw what appeared to be a gas well. He again called Profitt who told him it was probably just a casing someone had left. Profitt then discussed the matter with Buffalo's chief engineer and it was "quickly agreed that there had been a gas well in that area." (Tr. 60-61). Profitt called Stepp and told him to get his men out and shut down the mine.

4. The matter was reported to State and Federal authorities and at 11:45 a.m., October 4, 1983, Federal Mine Inspector Oscar R. Nally Jr., issued an Order of Withdrawal covering the entire mine. The condition found was described in the Order as follows: "The certified mine map was not accurate in that an active gas well was mined into in the No. 2 entry 001 section. This well nor any other well was shown on the certified map" (Union Exh. 1).

5. The condition was abated by Pine Tree building a concrete wall around the well. Buffalo delivered the necessary supplies and reimbursed Pine Tree for the wages paid the miners who did the abatement work. Buffalo also drew up the plan for sealing the well and directed and instructed Pine Tree how to do the work.

agreement," whereby it agreed to indemnify and hold harmless Pine Tree "from and against all liability for claims, actions, demands, fines, penalties, citations and other actions which have been or which might be asserted . . . against Pine Tree . . . by state and/or federal agencies . . . with respect to matters directly related to the . . . accident on October 3, 1983." (Union Exh. 2).

STATUTORY PROVISIONS

Section 111 of the Act provides in part as follows:

If a coal or other mine or area of such mine is closed by an order issued under section 103, section 104, or section 107, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser.

Section 3(d) of the Act provides as follows: "'Operator' means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine."

CONCLUSIONS OF LAW

1. Pine Tree is liable under section 111 to pay compensation to miners idled as a result of the order of withdrawal. Pine Tree operated the mine, employed and paid wages to the miners and was served with the withdrawal order. Pine Tree is liable even though the condition giving rise to the withdrawal order was the responsibility of Buffalo. Fault is an element in determining liability under section 111.

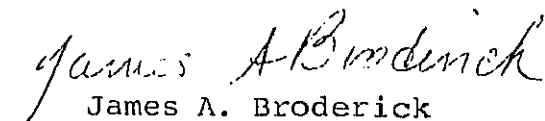
2. Buffalo is liable, jointly and severally with Pine Tree, under section 111 to pay compensation to the miners idled as a result of the order of withdrawal. Buffalo was the "owner" or "lessee" of the mine. Buffalo supervised Pine Tree's activities, in particular with respect to projections and mapping. The mining into the gas well which caused the withdrawal was specifically directed by Buffalo. Mine owners have been held liable for safety violations committed by independent contractors. Bituminous Coal Operators Association v. Secretary, 547 F.2d 240 (4th Cir. 1977) (under the 1969 Coal Act); Secretary v. Republic Steel Corporation, 1 FMSHRC 5 (1979) (1969 Coal Act). By analogy the owner may be held strictly liable to pay compensation to miners idled by a withdrawal order, even though the owner is not the employer of the miners. In Secretary v. Phillip Uranium Corporation, 4 FMSHRC 549 (1982) (1977 Mine Act), the Commission said that the test to determine an owner's liability depends on "whether the Secretary's decision to proceed against an owner for the contractor's violation was made for reasons consistent with the purposes and policies of the 1977 Act." By analogy, the decision to proceed in a compensation matter against an owner may be upheld if, as in the case here, the conditions giving rise to the withdrawal were the responsibility of the owner. I conclude that Pine Tree and Buffalo are jointly and severally liable to pay the compensation hereafter awarded to the miners in this case.

3. The Commission is without authority to interpret the indemnity agreement referred to in Finding of Fact No. 6. I do not decide whether under that agreement Buffalo is liable over to Pine Tree for the compensation due the miners here.

Respondents are ORDERED to pay the following compensation under section 111 of the Act to the miners named below:

Mitchell Hensley	\$ 488.34
Michael Hensley	488.34
Bob Bryant	471.35
Woodrow Chambers	488.34
Steve Meade	488.34
Calvin Tomblin	488.34
Clifton Tomblin	488.34
Tim Adams	523.72
Billy Tomblin	502.80
Thomas Hensley	554.60
James Smith	538.40
Herbert Stramon	554.60
David Meade	538.40
Roger Adkins	514.80
Michael Bailey	415.04
Jim Gullett	415.04

Respondents are FURTHER ORDERED to pay interest on the above compensation in accordance with the Commission - approved formula in Secretary/Bailey v. Arkansas-Carbona, 5 FMSHRC 2042 (1983). Interest shall be paid at the rate of 11 percent per annum (.03055 percent per day) from October 4, 1983 to June 30, 1984, and at the rate of 13 percent per annum (.0361 percent per day) from July 1, 1984 until paid. 1/


James A. Broderick
Administrative Law Judge

1/ Interest on compensation awards was upheld by the Commission in Mine Workers Local 5869 v. Youngstown Mines Corp., 1 FMSHRC 990 (1979). This case was decided prior to the adoption of the Arkansas-Carbona formula for discrimination awards. I believe the same formula should apply to compensation awards.

Joyce A. Handia, Legal Assistant, United Mine Workers of
America, 900 15th Street, N.W., Washington, DC 20005
(Certified Mail)

Carter Elkins, Esq., and W. Nicholas Reynolds, Esq.,
Campbell, Woods, Bagley, Emerson, McNeer and Herndon,
14th Floor Coal Exchange Building, P.O. Box 1835,
Huntington, WV 25719 (Certified Mail)

Mr. Donald R. Johnson, Assistant General Counsel, Pittston
Coal Group, Buffalo Mining Company, P.O. Box 4000, Lebanon,
VA 24266 (Certified Mail)

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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
DEPARTMENT OF SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 82-204-M
Petitioner	:	A.C. No. 05-03657-05501
	:	
v.	:	Fair Chance Mine
	:	
CHANCE MINES, INC.,	:	
Respondent	:	

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
No appearance for Respondent.

by: Judge Carlson

Pursuant to notice, a hearing on the merits in this civil
penalty proceeding was convened at 10:00 a.m. on January 11, 1985
in the Commission's hearing room in Denver, Colorado. No ap-
pearance was made by or on behalf of the respondent mine operator.
At 10:33 a.m., counsel for the Secretary of Labor was permitted
to present his case through the testimony of the mine inspector
and the introduction of photographic exhibits. At the close of his
presentation the Secretary's counsel moved for the entry of a judgment
of default. The motion was taken under advisement.

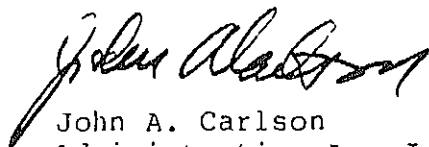
By order issued and mailed on January 11, 1985, respondent's
representative was notified that a decision affirming the
penalties alleged and assessing the proposed civil penalties
would be entered by default unless respondent showed good cause
for its failure to appear. The time for response has now ex-
pired, and nothing has been filed.

ORDER

Accordingly, respondent is declared to be in default for
failure to appear. The alleged violations and appropriateness of
the proposed penalties having been proved in open hearing,

Immediately: for Citation 334930, \$112.00; for Citation 334933,
\$20.00; for Citation 2009704, \$122.00; for Citation 2009706,
\$170.00.

SO ORDERED.



John A. Carlson
Administrative Law Judge

Distribution:

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/blc

FEB 19 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 83-39
Petitioner	:	A.C. No. 15-12685-03502
v.	:	
	:	Docket No. KENT 83-63
W R W CORPORATION	:	A.C. No. 15-12685-03503
Respondent	:	
	:	Docket No. KENT 83-65
	:	A.C. No. 15-12685-03504
	:	
	:	Docket No. KENT 83-68
	:	A.C. No. 15-12685-03505
	:	
	:	Docket No. KENT 83-138
	:	A.C. No. 15-12685-03506
	:	
	:	Docket No. KENT 83-179
	:	A.C. No. 15-12685-03507
	:	
	:	Docket No. KENT 83-213
	:	A.C. No. 15-12685-03508
	:	
	:	Docket No. KENT 83-250
	:	A.C. No. 15-12685-03509
	:	
	:	No. 1 Mine

DECISION

Appearances: William F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner; Michael T. Gmoser, Esq., Hamilton, Ohio, for Respondent.

Before: Judge Melick

These consolidated cases are before me upon the petitions filed by the Secretary of Labor, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", in which the Secretary seeks civil penalties against the W R W Corporation (WRW) of

tial" and unwarrantability findings made by the Secretary in connection with certain citations and orders herein. In defense, WRW claims that it was not responsible for the violations because it was not an "operator" within the meaning of section 3(d) of the Act. WRW argues in the alternative that even if it was an "operator" under the Act, since the subject mine was only a small operation from which it made no profit and since it has only \$10 or \$15 remaining in corporate assets, it should not be required to pay the proposed penalties.

These proceedings were delayed at the request of the parties pending resolution of a Federal Grand Jury investigation purportedly concerning the deaths of 2 miners resulting from the same incidents underlying the violations charged herein. After the lapse of more than a year without any stated disposition by the Grand Jury it was deemed appropriate to proceed on the merits of the cases before this Commission.

In the early evening of January 5, 1982, Joe Main and Alfred Gregory, Jr., miners with no training and less than a months experience, were killed at the WRW No. 1 underground mine as a direct result of egregious violations of mine safety regulations. The men died from carbon monoxide remaining in the mine atmosphere because of grossly inadequate ventilation and after unlawful blasting from the solid without stemming and blasting simultaneously at six working faces.

The day shift, consisting of five miners and the uncertified supervisor Paul Jordan, had arrived at the mine around 9:30 a.m., on January 5, 1982. Jordan and four of the miners loaded and hauled coal to the surface until about 1:00 p.m. After lunch, the crew reentered the mine and drilled 11 blast holes in each of the faces of the six working places. After charging each of the holes with caps and five or six sticks of explosives, (thus totaling 300 to 360 sticks) they were wired for simultaneous blasting. At about 4:30 p.m., Jordan connected a blasting cable to a 220-volt AC circuit and detonated the explosives from the surface.

1/ Citation No. 979006, Docket No. KENT 83-68 was dismissed at hearing upon the Secretary's request for withdrawal. Commission Rule 11, 29 C.F.R. § 2700.11.

ground for awhile" so the smoke from the explosives could clear up. Gregory entered the mine around 5:30 p.m. and hauled three loads of coal to the surface without incident. He entered a fourth time, but did not return. Joe Main, one of the surface employees, then entered the mine to look for Gregory. Main returned once to the surface unable to locate him. Around 6:30 p.m., Main returned underground to continue his search. Main did not reappear after 30 minutes so another surface employee, Keith Turner, went for help. Turner and Ellis Gregory Jr., brother of the deceased, later entered the mine and found the bodies of Gregory and Main.

WRW maintains that it was not responsible for those deaths or for any violations at its No. 1 Mine, because it was not an "operator" within the meaning of section 3(d) of the Act. It contends that it did not exercise control or supervision over the mine or the miners, and relinquished all control and supervision to an independent contractor, Paul Jordan.

Section 3(d) of the Act, defines "operator" as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine." It is not disputed that WRW was lessee of the coal mine at issue (Exh. G-12). The issue then is whether during relevant times WRW operated, controlled or supervised that mine. As evidence that it did not, WRW cites mining agreements reached in May and November 1981 with Paul Jordan, the purported independent contractor (Exh. G-6, and G-7). Whether or not WRW was operating, controlling or supervising the subject mine does not, however, depend upon the formalities of a document but rather is a factual issue determined by all the surrounding circumstances. In this regard, there is substantial credible evidence to conclude that WRW continued to be an "operator" within the meaning of section 3(d) of the Act even after engaging the services of the purported independent contractor, Paul Jordan.

It is undisputed that the subject mine has always been operated under an identification number issued to WRW based upon its application to MSHA, as the responsible mine operator, and that even after it had been cited by MSHA for previous violations WRW never sought to change its official status as responsible mine operator. Under section 109(d) of the Act, the mine "operator" is required to file with MSHA its name and address as the operator responsible for the mine and must promptly report to MSHA any changes in that relationship.

WRW was cited by MSHA at a time when it claims that an independent contractor was solely responsible for the mine operation. However the evidence shows that WRW paid for those citations with checks drawn on its own bank account and that the "independent contractor" was represented in the citations as a partner and, therefore, as an agent of WRW. There is no evidence, moreover, that WRW disclaimed its legally established status as "operator" at any time prior to the initiation of these cases. Accordingly, WRW is estopped from now denying that relationship. Secretary v. Swope Coal Co., 1 FMSHRC 1067 (1979). 2/

In addition to holding itself out as the responsible mine operator WRW also exercised actual supervision and control over significant mining activities. It is undisputed that WRW furnished all equipment and supplies necessary for the mining operations and had an exclusive contract to purchase all of the coal produced. In addition, according to Jess Alford, a certified mine foreman with whom WRW contracted to buy coal from January to May 1981, Noah Woolum, president of WRW, directed Alford's associates in performing work in the surfaces areas of its two mines including the cutting and hauling of logs to construct a tippie for the No. 2 Mine. Woolum also made the decision to begin mining the No. 2 Mine and suggested to Alford that he work at night to avoid the mine inspectors. 3/

According to one of the miners working for Alford, Roy Hampton, Noah Woolum had him perform various job assignments usually through instructions to Alford. On one occasion however, Woolum directly told Hampton to build a coal tippie

2/ WRW also applied for, and was issued as mine "operator", a Surface Disturbance Mining Permit from the Commonwealth of Kentucky (Exh. G-44) and a performance bond was obtained by WRW in its own name in connection with that application (Exh. G-43). WRW therefore not only held itself out as the responsible mine operator to MSHA but also to state authorities.

3/ Woolum denied that he directed mining activities or that he suggested methods to avoid inspectors. I do not find these denials to be credible in light of the contrary testimony of Alford, Roy Hampton, Tony Evans, Paul Jordan and Leroy Jordan discussed infra. In particular no reasonable motive to falsify has been attributed to Alford, Hampton or Evans. In addition, because of the consistency and cross corroboration provided among and by these witnesses to the testimony of Paul and Leroy Jordan I find the testimony of

after Alford quit and indeed produced some coal for WRW even though he was not a certified foreman and Woolum knew he was not. ^{4/} Hampton later tried to get a certified foreman for Woolum but was unsuccessful.

Paul Jordan subsequently met Noah Woolum at a gas station where Jordan was having his car repaired. Jordan said that Woolum approached him about running his mine and even though Jordan told him that he was not a mine foreman. Woolum nevertheless asked Jordan to be his "foreman". Jordan thereafter examined the two mines and agreed to "give it a try." They reached a contract on May 30, 1981, and Jordan began work the same day.

Marty Smith, Noah and Bill Woolum, Bill Woolum Sr., William Eastrich, Paul Jordan, and his brother Leroy Jordan showed up on the first day of work. Noah first directed that the equipment be moved from the No. 1 to the No. 2 Mine. Later, several men went into the No. 2 Mine to prepare for production. During this time a rock fell on Leroy Jordan's foot, crushing it. Noah Woolum later told Leroy that since WRW did not have workmen's compensation coverage WRW would pay his hospital bills directly. The evidence shows that WRW paid Leroy for about 2 months lost work and for some of his medical bills.

After the accident at the No. 2 Mine Noah told Paul Jordan to move the equipment back to the No. 1 Mine. Woolum also asked Jordan around this time whether he had a certified mine foreman's license and when Jordan replied in the negative, Woolum reportedly said "never mind, we can't make any money operating legally."

Thereafter, Noah Woolum was reportedly present at the mine every other weekend, bringing the "payroll" and sometimes operating the loader. According to Jordan, Woolum also occasionally directed the men to load coal and move equipment. On one occasion Woolum told Jordan to place a cable across the mine access road "to keep the inspectors

^{4/} Woolum's testimony that Hampton performed "clean up" work in the WRW mines is not inconsistent with Hampton's testimony that he produced coal for Woolum. Both activities constitute mining and the evidence that Woolum had a person known to him not to have been a certified foreman performing such activities supports Paul Jordan's testimony, discussed infra, that Woolum retained him knowing that he was not a certified foreman.

avoid contact with the mine inspectors.

According to Jordan, Woolum also told him where to drive the headings, where to put power lines, how to pump water out, and how to maintain the mining equipment. On occasion, Woolum even removed the mine ventilation fan, telling Jordan only that it belonged to someone else. Woolum then reportedly had Leroy Jordan help him replace the fan with a smaller one and move it to a new location. The ventilation was so bad after that that both Jordans complained "numerous" times to Woolum about the problem and on at least one occasion Paul Jordan told Woolum that "the guys were getting sick on bad air." In response, Woolum reportedly offered only to try to hang new (brattice) curtains inside the mine.

According to Jordan, Bill Woolum, another WRW officer, appeared at the mine site on the alternate weekends. Bill worked on the loader moving mud and dirt, built a canopy and set up some electrical wiring and lights. He occasionally used Leroy Jordan to assist him. According to Paul Jordan, all the major decisions concerning the mine were made by Noah or Bill Woolum, including decisions concerning equipment break downs, hauling coal, buying pumps, night work, and the direction of mining. Jordan conceded, however, that he was never specifically told how to mine the coal and that he hired and fired his own workers and set their level of pay. ^{5/}

According to Leroy Jordan, he was hired by Noah Woolum in mid May or early June 1981. On his first day of work, Woolum directed him to move mining equipment from the No. 1 to the No. 2 Mine. Noah and Bill Woolum were then operating the "tractors." Jordan later went underground at the No. 2 Mine operating a scoop and setting timbers. The No. 2 Mine had been driven about 80 feet to 100 feet at that time. After his foot was fractured in a roof fall, Noah and Bill Woolum told him that while they were not insured, they would take care of "everything". Leroy thereafter received \$100 a week for 6 weeks as compensation from WRW, and payment by WRW for some of his medical bills.

^{5/} Noah Woolum testified at the hearing that he "never instructed them [Jordan and his crew] what to do about anything". This statement and other similar denials are without credibility in light of the overwhelming contradictory evidence. See fn. 3 supra.

and "picked slate". During this time Noah Woolum usually appeared on Friday and Saturday and performed cleanup, repair and electrical work. Noah also had Leroy help him do cleanup work, move rocks and equipment and climb poles to erect electrical wires. According to Leroy, Noah also told Paul Jordan where to mine, and had co-worker Marty Smith cutting timbers for roof support, cleaning up rocks, "picking slate" and shovelling loose coal. In particular, Leroy recalled that Noah told him on one occasion to haul a ventilation fan in the "jeep" and set it up in a new location. Noah also reportedly told the miners to avoid contact with mine inspectors. They were told to run off into the woods or hide in the mine if the inspectors showed up. Noah also began the night shift to further avoid contact with mine inspectors.

After the ventilation fan was replaced by a smaller one Jordan and the other miners began getting sick from lack of ventilation and complained to Noah. Noah later brought in some plywood to "direct the air." The ventilation was still inadequate however and Leroy continued to get sick. He had dizzy spells, throbbing headaches, nausea and felt like he was going to pass out. He was taken to the hospital five times for these problems and finally quit about 2 weeks before the fatalities.

Tony Evans was a miner hired by Paul Jordan. He had never previously worked in a coal mine, had no training, and was not a certified coal miner. On one occasion Noah Woolum directed him to build a canopy over the mine portal. Woolum was present for about 4 days during that week.

Noah Woolum testified that he and his brother Bill inherited the property here at issue, and that they incorporated with a friend, Roger Richardson, to have the coal mined. They were referred by their attorney to a certified mine foreman Jess Alford who would obtain the necessary licenses and permits to mine coal. Woolum knew that it was necessary to have a certified person run the mine and therefore "hired" Alford.

The corporation, known as WRW, thereafter contracted with Alford to mine the coal and WRW furnished all the supplies and equipment, including an \$18,000 scoop, a \$10,000 loader and a truck. A charge account was also established for Alford at supply stores and he was purportedly given free rein to charge the supplies he needed. Woolum denied ever telling Jess Alford what to do, and

uncertified employee, Roy Hampton, was retained to "cleanup" and to "look for" coal in the mines. Hampton was to get a certified foreman to operate the mine for Woolum but was unsuccessful.

According to Woolum, Paul Jordan later approached him at a service station near the mine and asked if "we still needed someone to run the mine." Jordan allegedly represented that he was qualified to run the mine. Without verifying his qualifications, WRW then contracted with Jordan to produce coal. As noted, Noah asserts that he never directed Jordan in any of his activities and was present at the mine only once a month to pay for the work. These assertions have not been found credible. fn. 2 and 4, supra. According to Woolum, WRW never made a profit in the enterprise and, after the fatalities, sold all its equipment to satisfy creditors. At the time of hearing, only about \$10 in corporate assets remained. The mines have been closed and the coal lease terminated.

Within the above framework of evidence I conclude that WRW not only held itself out in its relationship with MSHA and other agencies as the responsible mine "operator" within the meaning of section 3(d) of the Act but also exercised, through its officers and agents, sufficient actual supervision and control over mine operations during relevant times to constitute an "operator" as a factual matter within that meaning. Accordingly, I find that WRW was a mine "operator" responsible under the Act for the violations at its mine. 6/

WRW acknowledges the existence of the violations charged in these cases and does not dispute the special "significant and substantial" and "unwarrantable failure" findings associated with some of the citations and orders at bar. It is nevertheless necessary to review the gravity of each violation and the degree of negligence attributable to WRW for purposes of determining the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. As to all violations, however, I find that WRW was grossly negligent based on the credible evidence that Noah Woolum, on behalf of WRW, knowingly engaged a non-certified and unqualified person to operate his mines. All of the

6/ WRW does not argue in these cases that the Secretary failed to properly apply his independent contractor enforcement policy. See Secretary v. Phillips Uranium Corporation, 4 FMSHRC 549 (1982) and Secretary v. Cathedral Bluffs Shale Oil Company, 6 FMSHRC 1871 (1984). The credible evidence herein does in any event establish that the Secretary did

ligence based on the evidence that Woolum, as president of WRW, knew he was operating the mines illegally and attempted to conceal these illegal operations from MSHA. Specific findings of negligence are also designated in the discussion below where it has been found appropriate to a specific violation.

Docket No. KENT 83-39

Citation No. 979126 alleges a violation of the standard at 30 C.F.R. § 75.512 for failure to have a qualified person employed at the mine to perform required electrical inspections on the electrical equipment. According to the undisputed testimony of MSHA supervisor Lawrence Spurlock, the failure to have such a qualified person at the mine contributed to many of the other violations including uninsulated power wires, impermissible mining equipment and electrical boxes without lids. These violative conditions in conjunction with the wet mine floor and inadequate methane testing could have resulted in explosions and electrocution. The violation was accordingly a serious one.

Citation No. 979127 charges a violation of the standard at 30 C.F.R. § 75.516 and alleges that the underground cable providing 220 volt power was not installed on insulators. It is undisputed that the conditions existed as cited and that because of the bare spots in the insulation of the 220-volt wire and the fact that it was lying on the wet floor there was a serious electrocution and shock hazard. The violation was accordingly serious. Inasmuch as Jordan conceded that the insulation had been intentionally removed so the wire could be used to detonate explosives, the violation was the result of gross negligence.

Citation No. 979128 alleges a violation of the standard at 30 C.F.R. § 75.1200 and charges that no accurate and current mine map was available at the subject mine. This was a serious violation in that without an accurate mine map it would be difficult for rescuers to quickly locate victims. This was a particular hazard in this case because of the presence of noxious gases. Without an accurate mine map, there is also the potential of mining into old works with possible flooding and/or inundation by "black damp."

Docket No., KENT 83-63

Citation No. 979125 alleges a violation of the standard at 30 C.F.R. § 75.503 and charges that the rubber-tired

electrical scoop was not installed in a conduit, the control panel box had an opening in excess of .005 inch and the battery couplers were not locked. The undisputed evidence is that these violations created a potential ignition source for triggering a coal dust or methane explosion. The hazard was particularly serious inasmuch as there was no methane detector available at the mine site.

Docket No. KENT 83-65

Citation No. 979121 alleges a violation of the standard at 30 C.F.R. § 75.309 and charges that no qualified person was employed at the mine to perform methane tests. Indeed, Paul Jordan had never even seen a methane detector at that mine. According to the undisputed testimony of MSHA supervisor Spurlock, a particularly serious hazard existed from the failure to perform methane testing because of the existence of the electrical permissibility violations.

Citation no. 979130 alleges a violation of the standard at 30 C.F.R. § 75.1713-7 in that the requisite first aid equipment was not available at the mine. According to Spurlock, the violation was serious because, for example, in the absence of a tourniquet, a miner could bleed to death.

Docket No. KENT 83-68

Citation No. 979005 alleges that the operator failed to withdraw persons who were not necessary to abate conditions described in a previously issued section 104(b) order. According to the undisputed testimony of supervisor Spurlock, miners were continuing to work in an area affected by the section 104(b) withdrawal order and which required additional roof support. The miners were thereby exposed to the serious hazard of roof falls.

Citation No. 979006 was dismissed at MSHA's request as having been erroneously issued.

Order No. 979095 alleges a violation of the standard at 30 C.F.R. § 75.307 in that there was no qualified person employed at the mine to perform methane tests. Such tests are required at each working place immediately before energizing electrical equipment and at intervals during mining operations. In light of the number and seriousness of the permissibility violations existent at this time, this violation was particularly serious and could have led to fatal explosions.

throughout the mine, the presence of ignition sources from permissibility violations and the practice of blasting without stemming, there was indeed a serious hazard of fatal explosions.

Order No. 979100 alleges a violation of the standard at 30 C.F.R. § 75.1600 in that there was no two-way radio communication available at the mine. According to Spurlock, this deficiency would prevent an injured person inside the mine from communicating for rescue purposes. It accordingly presented a serious hazard.

Docket No. KENT 83-138

Order No. 979098 alleges a violation of the standard at 30 C.F.R. § 75.402 in that there had been no rock dusting at the subject mine. According to MSHA's supervisor Spurlock, without rock dust, coal dust becomes suspended in the air, thereby creating an explosive environment. The violation was particularly hazardous because of inadequate ventilation at the mine, the existence of electrical permissibility violations, and the practice of blasting without stemming.

Docket No. KENT 83-179

Order No. 979093 alleges a violation of the standard at 30 C.F.R. § 75.306 in that there was no qualified person at the mine performing ventilation tests. It is undisputed that there was not even an anemometer available at the mine to perform such tests. MSHA supervisor Spurlock opined that this violation directly contributed to the fatalities in the mine. Proper testing would have revealed insufficient ventilation in the area where the miners were killed.

Order No. 979096 alleges a violation of the standard at 30 C.F.R. § 75.314 in that there was no qualified person at the mine to perform examinations of idled and abandoned areas. Such examinations would detect low oxygen, the existence of methane, poor roof conditions and other serious hazards.

Order No. 979099 alleges a violation of the standard at 30 C.F.R. § 75.517 in that insulation had been removed from portions of the 220-volt power cable and the cable was lying on the wet mine floor. Under the circumstances, the serious hazard of burns, shock, and electrocution existed.

Citation No. 979122 alleges a violation of the standard at 30 C.F.R. § 77.512 and charges that the cover plate of the main power box had been removed. Persons could then contact the exposed wires and suffer burns, shock and electrocution.

Order No. 979123 alleges a violation of the standard 30 C.F.R. § 77.513 in that there was no insulation mat to insulate people from electrical shock at the switch box. The violation could result in electrical shock, burns and electrocution, and was accordingly serious.

Order No. 979124 alleges a violation of the standard 30 C.F.R. § 77.1301(b) in that detonators and deteriorated explosives were stored together. The evidence shows that a serious explosion hazard existed from the potential spontaneous ignition of the deteriorated explosives.

Docket No. KENT 83-213

Citation/Order No. 979092 alleges a violation of the standard at 30 C.F.R. § 75.200 in that loose roof had not been supported and hill seams were not cribbed as required by the roof-control plan. MSHA supervisor Spurlock found that an imminent danger of death and serious injuries existed from the described hazard. This finding is not disputed.

Citation No. 979129 alleges a violation of the standard at 30 C.F.R. § 75.1715 and charges that there was no check-in and check-out system in effect at the mine. Without such a system, there was no way of obtaining positive identification of persons who may have been working underground. Without such a system, neither management nor potential rescuers could determine whether any persons remained in the mine after an accident. Under the circumstances, rescue may be placed at unnecessary risk in trying to locate persons who may no longer be in the mine. The violation was accordingly serious. It was particularly serious in this case because rescuers did in fact continue to search the mine for other possible victims of the noxious gases.

Docket No. KENT 83-250

Order No. 979081 alleges a violation of the standard 30 C.F.R. § 75.301 in that the working faces of the active places in the mine were not being ventilated by a current of air sufficient to dilute and render harmless any

hours later because of the inadequate ventilation. The evidence shows in fact that it was impossible to devise a ventilation system that could provide sufficient air in the working places and the closure order remains in effect in the subject area. The violation was a serious one and, as indicated, was a direct cause of the two fatalities. The violation was also related to the interference by WRW president Noah Woolum in removing a larger ventilation fan, and in selecting the direction of headings. Woolum had also been warned on several occasions of the inadequate ventilation but did nothing to correct it.

Citation No. 979082 alleges a violation of the standard at 30 C.F.R. § 75.302 in that no line brattice was being used to improve the ventilation of the subject mine. According to Spurlock, this was also a direct cause of the fatalities in that the failure to have line brattice permitted the buildup of fatal carbon monoxide. The violation was also attributable to the failure of Noah Woolum to have furnished the brattice that he said he would provide.

Order No. 979083 charges a violation of the standard at 30 C.F.R. § 75.304 in that there was no certified person at the mine to perform on-shift examinations. The evidence shows that the requisite instrumentation for conducting such examinations, including a methane detector and a flame safety lamp, were not even available at the mine. These were serious violations that could have contributed to the fatalities in this case.

Order No. 979084 charges a violation of the standard at 30 C.F.R. § 75.320 and alleges that no methane tests were performed before or after blasting at the subject mine. The evidence shows that a mine explosion could be triggered by the blasting if methane or coal dust were present. A serious hazard accordingly existed.

Order No. 979085 alleges a violation of the standard at 30 C.F.R. § 75.1303 in that the mine operator was blasting six places at one time with 300 sticks of explosives. As a result of the use of excessive amounts of explosives, dust and gases were put into suspension thereby potentially propagating an explosion of the entire mine. The hazard was aggravated in this case by the failure to stem the explosives, thereby creating a serious ignition source for any suspended coal dust or methane that might be present. Excessive carbon monoxide also resulted from these blasting practices, and, as noted, was the direct cause of the

Order No. 979086 alleges a violation of the standard at 30 C.F.R. § 75.1714(a) in that there was an insufficient number of self-rescuers available for the number of miners working. Inasmuch as self-rescuers filter out carbon monoxide, it is quite possible that, had the deceased miners been equipped with self-rescuers, they might have survived. The violation was quite serious and may be considered a contributing cause to the fatalities in this case.

Citation No. 979087 alleges a violation of the standard at 30 C.F.R. § 75.48.5 in that the new miners employed at the subject mine had not received the training required by section 115 of the Act. One of the deceased miners had only 1 week experience and the other began working the night of his death. It may be reasonably inferred that had the miners had the proper training, they would have been able to understand the hazards they faced in working in the subject mine, thereby possibly preventing their death.

Citation No. 979088 alleges a violation of the standard at 30 C.F.R. § 75.48.7 in that none of the miner's at the subject mine had received task training before assignment to work duties. It may reasonably be inferred that if such training had been given that the miners would have been aware of the hazards presented by the subject mine.

Citation No. 979089 alleges a violation of the standard at 30 C.F.R. § 75.300 in that the mine fan was neither installed nor operated in an approved manner. The fan was installed in front of the mine opening, in a combustible wood housing and without a water gauge. According to MSHA supervisor Spurlock, the violation directly contributed to the fatalities in the case inasmuch as the fan was not providing sufficient ventilation to remove carbon monoxide from the area in which the victims were working. The violation was accordingly serious. Since the fan was obtained and positioned by Noah Woolum himself, WRW was, for this additional reason, grossly negligent.

Order No. 979091 alleges a violation of the standard at 30 C.F.R. § 75.303 in that a certified person was not employed at the mine or available to perform preshift examinations. The violation was quite serious and contributed to the fatalities in the case. The violation is directly attributable to WRW's failure to have engaged a certified foreman at its mine.

30 C.F.R. § 75.305 and alleges that no certified person was employed at the mine to perform the required weekly examinations, including examinations of the intakes, return air courses, and escapeways. If such a person had been employed and had been performing his duties, the evidence shows that the violations that led to the fatalities in this case would probably have been discovered and the fatalities avoided. The violation was accordingly quite serious. The violation was also directly attributable to WRW's failure to have engaged a certified foreman at its mine.

In determining the amount of penalties I am assessing in these cases, I have also considered the evidence that WRW was a small mine operator. I also note that considering its size and the length of time it had been operating, WRW had only a moderate history of reported violations. That reported history does not however reflect the evidence that WRW had been operating its mines without MSHA's knowledge for at least 7 months. It may reasonably be inferred that it was operating during this time with many of the same violative conditions cited in these cases since it was being operated under the direction of the same unqualified and uncertified individual. It appears that the violations in these cases that could be abated, were in fact abated, but both the No. 1 and No. 2 Mines have been abandoned. WRW is no longer in the mining business and has no intention to resume such business.

The evidence also shows that WRW has so depleted its assets that it has only "\$10 or \$15" remaining. However because of the egregious violations in these cases coupled with the gross negligence on the part of WRW principals, I find that the substantial penalties I am imposing herein are appropriate. I fully expect that, should MSHA find itself unable to collect these penalties from corporate assets, it will pursue collection proceedings against the individual stockholders by piercing the corporate veil. The facts in this case clearly warrant such proceedings. See U.S. v. Pisani, 646 F.2d 83 (3rd Cir. 1981); and DeWitt Truck Brokers v. W. Ray Flemming Fruit Co., 540 F.2d 681 (4th Cir.

little or no assets to escape responsibility under the Act. It is apparent moreover, because of the direct personal involvement by WRW president Noah Woolum in several of the more serious violations, that penalty proceedings against that corporate officer would also be warranted under section 110(c) of the Act.

ORDER

WRW Corporation is hereby ordered to pay the following civil penalties within 30 days of the date of this decision:

Docket No. KENT 83-39

<u>Citation No.</u>	<u>Amount of Penalty</u>
979126	\$ 500
979127	450
979128	450

Docket No. KENT 83-68

979005	500
979095	500
979097	300
979100	200

Docket No. KENT 83-63

979125	150
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Docket No. KENT 83-65

979121	345
979130	100

7/ Consider in these cases, for example, the absence of corporate records such as the corporate minutes allegedly lost, the apparent failure to observe corporate formalities, the undercapitalization of the firm and the maintenance of its undercapitalization by loaning it money instead of investing equity in it, the absence of dividends and eventual insolvency, the intentional conduct by one or more stockholders of illegal mining activities and efforts to deceive Federal inspectors and the fundamental injustice in these cases of permitting the stockholders to be shielded.

ocket No. KENT 83-138

979098

255

ocket No. KENT 83-179

979093

500

979096

400

979099

750

979122

400

979123

400

979124

350

ocket No. KENT 83-213

979092

500

979129

300

ocket No. KENT 83-250

979081

10,000

979082

10,000

979083

5,000

979084

5,000

979085

10,000

979086

10,000

979087

5,000

979088

5,000

979089

10,000

979091

8,000

979094

5,000

\$90,050

Gary Melick

Assistant Chief Administrative Law Judge

Department of Labor, 280 U.S. Courthouse, 801 Broadway
Nashville, TN 37203 (Certified Mail)

Michael T. Gmoser, Esq., Attorney for W R W Corporation
Rentschler Building, Hamilton, OH 45011 (Certified Mail)

rbg

FILED CHURCH, VIRGINIA 22041
BUREAU OF MINES
DEPARTMENT OF LABOR, : CIVIL PENALTY PROCEEDING
MINING SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 83-51
Petitioner : A.C. No. 01-01247-03546
: :
v. : No. 4 Mine
: :
WALTER RESOURCES, INC., :
Respondent :

DECISION

Attorneys: Robert W. Pollard, Esq., and R. Stanley
Morrow, Esq., Jim Walter Resources, Inc.,
Birmingham, Alabama, for Petitioner;
Terry Price, Esq., Office of the Solicitor,
U.S. Department of Labor, Birmingham, Alabama,
for Respondent.

Judge: Judge Fauver

The Secretary of Labor brought this action for a civil
penalty under section 105(d) of the Federal Mine Safety
and Health Act of 1977, 30 U.S.C. § 801, et seq. The case
was heard in Birmingham, Alabama. Having considered the
evidence and the record as a whole, I find that a preponderance
of the substantial, reliable, and probative evidence establishes
the following:

FINDINGS OF FACT

1. Respondent is the owner and operator of an underground
mine, known as Mine No. 4, which produces coal for sale
in or substantially affecting interstate commerce.
2. On March 9, 1983, Federal mine inspector Milton Zimmerman
issued Order No. 2192440, citing Respondent for a violation
of 30 C.F.R. § 75.202, alleging that, in the No. 9 section
of the mine, beginning 20 feet in by spad No. 1793 and extending
for 200 feet, the roof had broken along the ribs in
places, roof bolt heads (bolt plates) had broken off because
of loose hanging roof, and in several places loose rock was
falling out between roof bolts. I find that there were
one or eight sheared off roof bolts, a condition indicating
stress requiring additional support; that there was
loose roof material in various places; and that there were
holes or cracks in the roof along the ribs and between roof
bolts in various places. These conditions were hazardous

3. The conditions cited by Inspector Zimmerman were abated by the Respondent in good faith and in a reasonable time, by installing additional roof support and by taking down loose roof material.

4. The hazardous roof conditions found by Inspector Zimmerman were readily observable and had existed for a substantial period before his inspection.

DISCUSSION WITH FURTHER FINDINGS

Respondent contends that there was some "scale" in the roof, but that this was normal and was not "loose roof" within the meaning of 30 C.F.R. § 75.202. The regulation provides that "Loose roof and overhanging or loose faces and ribs shall be taken down or supported." Respondent acknowledges that "scale" must be taken down or supported for the safety of the miners. I find that so-called "scale" is loose roof within the meaning of 30 C.F.R. § 75.202 if there is a reasonable risk that the "scale" may work loose and fall with or without warning. I find that there was "loose roof" in the areas cited by Inspector Zimmerman. I also find that there were seven or eight broken roof bolts, with the heads sheared off. The broken roof bolts indicated roof stress requiring additional roof support. Respondent offered testimony that the stress on the roof bolts was horizontal stress rather than vertical stress, but such opinion evidence did not lessen the need to add roof support and to take down loose roof material, and to danger off the affected area while these measures were taken.

Respondent's failure to take necessary corrective action before the inspection constituted a violation of 30 C.F.R. § 75.202.

The gravity of the violation was very serious because the affected area was regularly traveled by miners and a roof fall could cause death or serious injury. The violation was thus "significant and substantial" within the meaning of section 104(d) of the Act.

are should have known, of the hazardous roof condition. It as therefore negligent and the violation was "unwarrantable" within the meaning of section 104(d) of the Act.

Respondent was in a "section 104(d)(2) sequence" at the time of the March 9, 1983, inspection. Before that date, respondent had been issued a section 104(d)(1) citation, then section 104(d)(1) order, and then a section 104(d)(2) order on every inspection following the issuance of the section 104(d)(1) order.

Respondent is a medium size operator, its history of prior violations is average, and imposition of a civil penalty would not affect its ability to continue in business.

Considering the criteria for assessing a civil penalty under section 110(i) of the Act, I find that an appropriate civil penalty for the violation in this case is \$2,000.

CONCLUSIONS OF LAW

1. Respondent's Mine No. 4 is subject to the Act and the Commission has jurisdiction in this proceeding.

2. Respondent violated 30 C.F.R. § 75.202 on March 9, 1983.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay a civil penalty of \$2,000 within 30 days of this Decision.



William Fauver
Administrative Law Judge

Distribution:

erry Price, Esq., Office of the Solicitor, U.S. Department of Labor, 1929 South Ninth Avenue, Birmingham, AL 35256 (Certified Mail)

. Gerald Reynolds, Esq., Jim Walter Corporation, 1500 North Dale Mabry Highway, Tampa, FL 33607 (Certified Mail)

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 84-27
Petitioner : A. C. No. 15-05209-03508
:
v. : No. 4E Mine
:
MITCH COAL CO., INC., :
Respondent :

DEFAULT DECISION

Appearances: Mary Sue Ray, Esq., Office of the Solicitor,
U. S. Department of Labor, Nashville, Tennessee
for Petitioner;
No one appeared at the hearing on behalf of
Respondent.

Before: Judge Steffey

When the hearing in the above-entitled proceeding was convened in Prestonsburg, Kentucky, on December 11, 1984, pursuant to a written notice of hearing dated October 24, 1984, and received by respondent on October 26, 1984, counsel for the Secretary of Labor entered her appearance, but no one was present at the hearing to represent respondent.

Under the provisions of 29 C.F.R. § 2700.63(a), when a party fails to comply with an order of a judge, an order to show cause shall be directed to the party before the entry of any order of default. An order to show cause was sent to respondent on December 14, 1984, pursuant to section 2700.63(a) requiring respondent to show cause why it should not be found to be in default for failure to appear at the hearing convened on December 11, 1984.

A reply to the show-cause order was filed by respondent on December 31, 1984. Respondent states that its mine has been closed since October 1, 1984, because of loss of its mining permit. Respondent's reply explains that its representative traveled to Frankfort, Kentucky, on December 10, 1984, and did not return until late on December 11, 1984. As a result of respondent's concern about being unable to work, its representative states that he simply forgot about the date of the hearing.

permit and its efforts to achieve the reopening of its mine, but I must also consider the fact that we can hardly process the cases that are assigned to us unless we require those who have asked for hearings to appear at the appointed time. Surely, respondent could have made a note of the hearing date on a calendar and could have asked for a continuance if December 10 was the only date that it could have traveled to Frankfort to find out whether it could reacquire its mining permit.

Moreover, it is difficult to communicate with respondent except by mail. The foregoing conclusion is based on a statement made by the Secretary's counsel at the hearing in response to my inquiry as to whether she had any comments she wished to make about respondent's failure to send a representative to the hearing (Tr. 3-4):

No, Your Honor, except that I have tried to contact Mr. Sammons, both at the mine and at his No. 2 Mine, and also at his home phone number this week, and I had no answer, so I have tried to be in touch with him several times in the past week.

In the circumstances described above, I find that respondent has failed to give a satisfactory reason for failing to appear at the hearing convened on December 11, 1984, and that respondent should be held to be in default for failure to appear at the hearing. Section 2700.63(b) of the Commission's rules provides that "[w]hen the Judge finds the respondent in default in a civil penalty proceeding, the Judge shall also enter a summary order assessing the proposed penalties as final, and directing that such penalties be paid."

WHEREFORE, it is ordered:

Respondent, having been found to be in default, is ordered, within 30 days from the date of this decision, to pay civil penalties totaling \$100.00 for the five violations alleged in this proceeding. The penalties are allocated to the respective violations as follows:

Citation No. 2183250	10/4/83	\$ 48.9	\$ 20.00
Citation No. 2183251	10/6/83	\$ 75.1722(a)	20.00
Citation No. 2183252	10/6/83	\$ 75.1719-1(d)	..	20.00
Citation No. 2183253	10/6/83	\$ 75.316	20.00
Citation No. 2183254	10/6/83	\$ 75.1100-2	<u>20.00</u>

Total Civil Penalties Proposed in This

Proceeding

\$100.00

of Labor, Room 280, U. S. Courthouse, 801 Broadway, Nashville,
TN 37203 (Certified Mail)

Mr. Grover Sammons, Mitch Coal Co., Inc., Box 12, Minnie, KY
41651 (Certified Mail)

FEB 25 1985

UNITED STATES BORAX AND	:	APPLICATION FOR REVIEW
CHEMICAL CORPORATION,	:	
Applicant	:	Docket No. WEST 82-144-RM
v.	:	Citation No. 385177; 2/26
	:	
SECRETARY OF LABOR,	:	Docket No. WEST 82-145-RM
MINE SAFETY AND HEALTH	:	Order No. 371298; 3/9/82
ADMINISTRATION (MSHA),	:	
Respondent	:	Boron Mill
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 82-187-M
Petitioner	:	A/O No. 04-03886-05019 F
v.	:	
	:	Boron Mill Mine
	:	
UNITED STATES BORAX AND	:	
CHEMICAL CORPORATION,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 83-100-M
Petitioner	:	A.C. No. 04-03886-05501 F
v.	:	
	:	Boron Mill
	:	
ALFRED E. FRENCH,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT
AND DISMISSING PROCEEDINGS

Before: Judge Broderick

On February 20, 1985, the parties submitted a Joint Motion for the Approval of Civil Penalty Proceedings and Withdrawal of Contest and Application for Review. With this motion, they submitted a copy of the MSHA Investigation Report of March 26, 1982, on the fatal accident occurring at the U.S. Borax facility on February 26, 1982, and a copy of a

tions during the 2-year period prior to the alleged violation which is the subject of these proceedings.

On February 26, 1982, a miner at the subject mine contacted a bare power conductor while cleaning a transformer. He suffered critical electrical burns and died on March 3, 1982.

MSHA conducted an investigation of the accident following which it issued a citation alleging a violation of 30 C.F.R. § 55.12-17 and an order of withdrawal for an imminent danger. The standard allegedly violated, provides that power circuits shall be deenergized before work is done on them, warning signs shall be posted and switches shall be locked out to prevent power circuits from being energized without the knowledge of individuals working on them. The imminent danger was described in the withdrawal order as resulting from insufficiently supervised and trained laborers being assigned to cleaning substations with high potential voltage present. The citation and the withdrawal order have been challenged by U.S. Borax in these proceedings.

The Secretary filed a civil penalty proceeding against U.S. Borax charging a violation of 30 C.F.R. § 55.12-17 and proposed a civil penalty of \$10,000. It filed a civil penalty proceeding against Alfred E. French, an electrical foreman at U.S. Borax, alleging that as an agent of U.S. Borax, he knowingly authorized, ordered, or carried out the violation of 30 C.F.R. § 55.12-17. It proposed a penalty of \$2,500 against French.

The settlement agreement of which the motion seeks approval, provides for the payment by U.S. Borax of a civil penalty in the amount of \$6,000 and by French in the amount of \$1,500. It further provides that the settlement shall not be deemed as an admission by U.S. Borax or French of a violation of the Act or any mandatory standard.

The motion states that the Secretary agreed to the settlement in part because of the unavailability of a witness, MSHA electrical inspector Billy Boulton who was the chief investigator of the fatal accident. Inspector Boulton has suffered a heart attack and was advised by his physician that testifying would cause a strain on his heart.

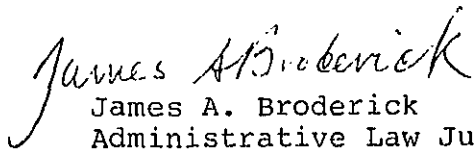
The history of prior violations shows that U.S. Borax had 87 paid violations in the 24-month period prior to the violation at issue here. None of the prior violations involved 30 C.F.R. § 55.12-17

I have considered the motion in light of the criteria in section 110(i) of the Act, and conclude that the settlement is in the public interest and should be approved.

Therefore, IT IS ORDERED that the settlement agreement is APPROVED. It is FURTHER ORDERED that U.S. Borax shall within 30 days of the date of this order pay the amount of \$6,000 as a civil penalty for the violation alleged against it. IT IS FURTHER ORDERED that Alfred French shall within 30 days of the date of this order pay the amount of \$1,500 as a civil penalty for the violation against him.

Upon the payment of these penalties, Docket Nos. WEST 82-187-M and WEST 83-100-M are DISMISSED.

On motion of U.S. Borax, the contest proceeding and Application for Review docketed as WEST 82-144-RM and WEST 82-145-RM are withdrawn and DISMISSED.


James A. Broderick
Administrative Law Judge

Distribution:

Scott H. Dunham, Esq., O'Melveny & Myers, 400 South Hope Street, Los Angeles, CA 90071-2899 (Certified Mail)

J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Peter D. Lewis, Esq., Waggy, Bunker, Hislop & Lewis, 2821 "H" Street, P.O. Box 2428, Bakersfield, CA 93303-5501 (Certified Mail)

/fb

FEB 26 1985

ROBERT SIMPSON, : DISCRIMINATION PROCEEDING
 Complainant :
 v. : Docket No. KENT 83-155-1
 : MSHA Case No. BARB CD 83
 KENTA ENERGY, INC., & :
 ROY DAN JACKSON, : No. 1 Mine
 Respondents :

DECISION

Appearances: Tony Oppegard, Esq., Hazard, Kentucky, and
 Stephen A. Sanders, Esq., Prestonsburg,
 Kentucky, for Complainant;
 Stephen D. Cundra, Esq., and Michael R.
 Gottfried, Esq., Thompson, Hine & Flory,
 Washington, D.C. for Respondents.

Before: Judge Broderick

In my decision of June 1, 1984, I concluded that Complainant Simpson was discharged for activity protected under the Mine Act and that therefore, his discharge was a violation of section 105(c) of the Act, 6 FMSHRC 1454 (1980). With respect to the operator of the mine, I stated that it was decided at the hearing that the issue of the personal liability of Jackson would await a determination of whether a violation of section 105(c) was established. If such a violation was found, the parties would be afforded the opportunity of submitting additional evidence on the question of Jackson's liability." Id., 1455. This followed a lengthy colloquy between Court and counsel on the record at the hearing on January 11, 1984 (Tr. 344-355).

Section 105(c)(1) of the Act provides that "no person shall discharge or discriminate against a miner for activity protected under the Act. Liability under this section shall not be imposed against a successor mine operator in Munsey v. Smitty Baker Coal Company, 2 FMSHRC 3463 (1980). The Mine Act decision was based on the case of Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973), in which the Supreme Court upheld a remedial order against a successor employer for unfair labor practice committed by its predecessor. Liability under section 105 of the Mine Act is not excluded

in a case against one who never employed the miner affected. Local 9800 UMWA v. Secretary of Labor, 2 FMSHRC 2680 (1980). Ordinarily, however, relief is only available from the mine operator. The term operator is defined in section 3(d) of the Act as "any owner, lessee or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine."

Complainant argues that "Jackson was the owner and operator of the Black Joe Mine, that he was the alter ego of Kenta Energy, Inc., and that Jackson should therefore be held personally liable for the relief due Simpson" Respondent argues that Complainant has failed to carry "his burden of showing sufficient unfairness to justify piercing the corporate veil, and imposing personal liability on [Kenta's] former employee Jackson." Although much of the post-decision evidence, much of Complainant's post-decision brief, and all of Respondent's post-decision brief are directed to the questions whether the corporate veil should be pierced and whether Jackson was the alter ego of Kenta, my view of the issue is a broader one: The question is, who was the person responsible for the discrimination? Or, perhaps, who was the operator of the mine at the time the discrimination took place? Who ought to be subject to "an order granting appropriate relief?" (Section 105(c)). I have found that Complainant was discharged in violation of the Act. I am now obliged to determine who was responsible for the discharge and who must provide appropriate relief. My obligation to make these determinations is not limited, as Respondent implies, to deciding "the issues framed by Complainant's June 27, 1984, Statement of Claim."

Following my decision of June 1, 1984, Complainant submitted a Statement of Claim against Roy Dan Jackson, a Statement Claiming Back Pay with Interest, and a Statement of Attorneys' Fees and Expenses. Objections were filed to each of these statements by Respondents. Further discovery was permitted by order issued July 30, 1984. Interrogatories and Requests for Admission were served on Respondents which were responded to. Depositions of William R. Forester, Karl Forester, Paul Bell, Shirley Powell, Barry Rogers, Roy Dan Jackson, Stanley Gilbert, Danny Noe, Dewey Middleton and Robert Cox were taken by Complainant.

Pursuant to notice, a hearing was convened in Hazard, Kentucky, on October 24, 1984. Robert Simpson testified on behalf of Complainant. No witnesses were called by

Following the hearing, Complainant and Respondents filed written affidavits and other submissions bearing on the appropriate hourly rate for the attorneys' fees claimed. Each side then filed posthearing briefs on the issue of Jackson's liability. Complainant filed a supplemental statement of attorneys' fees and expenses, and Respondent filed a statement in opposition thereto.

I. THE ISSUE OF JACKSON'S LIABILITY

A. JACKSON'S RELATIONSHIP TO KENTA

The subject mine, designated as the No. 1 Mine, was also known as the Black Joe No. 1 Mine. It was operated by the Black Joe Coal Company, of which Jackson was 50 percent owner, and began producing coal in about 1977. At some time before September, 1980, the Black Joe Coal Company "went broke" and mining was discontinued. At that time Jackson owned or controlled the Helen Ann Coal Company, Inc., Penelee Coal Company, Inc., Sugar Rock Coal Company, Inc., and Doile Coal Company, Inc.

On September 26, 1980, Jackson, Helen Ann, Penelee, Sugar Rock and Doile entered into a contract with Kenta Energy Inc. and Associates, described as a limited partnership, wherein Kenta agreed to purchase all the transferrable assets of Helen Ann, Penelee, Sugar Rock and Doile, including coal mining equipment and coal leases, in return for the payment of \$6,000,000, to be paid in specified installments. Jackson agreed to enter into a "management agreement" for 2 years as the President of Kenta. The agreement was signed by Jack Allen, President of Helen Ann, Jack Allen, President of Penelee, Keston Sturgill, President of Sugar Rock and Glenn Doile Vandagriff, President of Doile. It was signed by Jackson as "Guarantor" for the four corporations, and by Jackson as President of Kenta Energy, Inc., and Associates. The employment contract wherein Kenta agreed to hire Jackson as its President

as President for the first party, Kenta, the employer, and again by Jackson as the second party, the employee. The agreement states that Jackson was a principal stockholder in Helen Ann and Penelee, and the managing officer of Sugar Rock. Doile had a contract, signed for Doile by Jackson as President, to supply coal through the Virginia Fuel Company to the Florida Portland Cement Company. Doile did not mine coal but sold the production of Helen Ann, Penelee and Sugar Rock pursuant to this contract. Doile agreed with Kenta to assign its interest in the coal sales contracts to Kenta. This agreement was signed by Doile Vandagriff, President of Doile and by Jackson, President of Kenta.

In the event of Kenta's default on payment of the purchase price installments, the contract provided that Jackson could repossess the assets sold. Neither the Black Joe Mine nor the Black Joe Coal Company was named in the contracts between Jackson and Kenta.

Some time in 1981, the Black Joe Mine was reopened (on February 24, 1981, Jackson applied to the State agency for a license to operate an underground coal mine). In early 1982, the Sugar Rock Mine was worked out, and the Black Joe Mine was "leased" to Kenta as a substitute. The lease was not produced, nor was any other documentary evidence of an agreement between Jackson and Kenta to substitute Black Joe for Sugar Rock. Respondents' statement (p. 4 post-trial Brief) that "In keeping with the Sales Agreement, which was based upon coal production rather than upon coal contained in a particular mine, see Sales Agreement at p. 3(g), Jackson substituted his lease on Black Joe Mine for the lease on the now non-producing mine" is speculative. In any event, the equipment and miners from Sugar Rock were transferred to Black Joe. Jackson applied for a 1982 license to operate Black Joe as Kenta Energy, Inc.

Exh 16) that if Kenta does not meet its principal or interest payments under the contract, Sellers (Helen Ann, Penelee, Sugar Rock, Doile) shall notify Purchaser (Kenta) of the default and if payments are not received within 30 days, Jackson as President of Kenta is authorized to transfer back to the sellers sufficient assets to pay the delinquent principal and interest as liquidated damages. In January, 1981, Kenta was notified by attorney William R. Forester (one of the original Directors of Kenta) that it was in default in its payments. In April, Forester notified Kenta that it was in default on the January 26, 1981, payment, though the payments due in September and November 1980 "have been paid in full, either by the payment of moneys or the retransfer of equipment to the various coal companies" (Comp. Exh. 19). In June 1981, separate letters from Helen Ann, Sugar Rock, Penelee and Doile were sent to Kenta notifying it that it was in default respecting the May 1981 payment. (Comp. Exhs. 20-23). Jackson testified that thereafter, he met with Kenta representatives and "they paid up until June of 81, I think." (Comp. Exh. 43, p. 60). He also stated that the next payment was not due until June, 1982. However, the contract entered into September 26, 1980, provides for payments on the contract date, with subsequent payments 2 months, 4 months, 8 months, and 16 months after the contract date (the last date would thus be January 26, 1982), and the balance payable 24 months after the contract date. At any rate, Kenta made no payments after June 1981, and at some time in 1981 or 1982, Jackson began to repossess the assets in accordance with the terms of the contract. (Deposition of Jackson August 15, 1983, p. 4). It is not a simple matter to determine legal ownership of the mine in question as of September, 1982 in view of these facts, but I conclude that (1) the evidence does not establish that Black Joe (the subject mine) was ever transferred from Jackson to Kenta; (2) Kenta was in default under the

rise to this proceeding occurred.

Although Kenta is a Respondent, and has appeared herein by counsel, its identity and presence in the evidence in this proceeding is very shadowy. Jackson was hired as its President, (by a contract signed by himself for both parties), but denied knowing whether he was formally appointed as a corporate officer, denied knowing who the officers or directors were, and denied any knowledge of the internal affairs of the corporation. The Respondents' attorneys, in support of their motion to withdraw as counsel for Kenta filed on October 3, 1984, state that they have been unable to contact any officer, director or authorized agent of Kenta.

B. OPERATION OF BLACK JOE MINE

Jackson was the operator of the Black Joe Mine as Black Joe Coal Company, before he had any dealing with Kenta. Whether or not the mine was transferred to Kenta after Sugar Rock was worked out, the overall operation of the mine continued under Jackson. In dealings with the government mining agency officials, in deciding how to recover the coal, in hiring and firing miners, Jackson was in charge. At one time (and the dates are uncertain) the miners were paid by checks from a Kenta account. The "German investors" who were or represented Kenta came to the mine office in the early years under the contract, but there is no evidence that they had or exercised any direction or control over the mining operations at Black Joe or any of the other Jackson mines. I conclude that Jackson was the operator of the mine in which Complainant worked as a miner at all times relevant to this proceeding.

C. THE DISCHARGE OF SIMPSON

Whatever Jackson's relation to Kenta, and whether or not he was the mine operator,

that he was only acting as manager of Kenta pursuant to his employment contract. However, he testified that his salary as Kenta's president had been discontinued and he was operating the mine in order to get his equipment returned. This was the situation when Complainant was discharged. The wraith-like German investors had nothing to do with Simpson's discharge: Jackson clearly did.

BACK PAY AND INTEREST

At the time of his discharge, Complainant was earning \$10.64 per hour, and was working 40 hours per week. I accept the information concerning interim earnings contained in the statements of back pay and interest filed July 2, 1984 and December 21, 1984.

The following is the back pay and interest due as of December 17, 1984, the interest being calculated in accordance with the formula approved by the Commission in Secretary/Bailey v. Arkansas-Carbona, 5 FMSHRC 2042 (1983)

1. First Quarter, 9/21/82 to 9/30/82

Gross back pay	\$ 680.96
Interim Earnings	.00
Net back pay	680.96
Interest to 12/17/84	198.32

2. Second Quarter, 10/1/82 to 12/31/82

Gross back pay	\$5,617.92
Interim Earnings	.00
Net back pay	5,617.92
Interest	1,355.27

3. Third Quarter, 1/1/83 to 3/31/83

Gross back pay	\$5,447.68
Interim Earnings	.00
Net back pay	5,447.68
Interest	1,095.72

Interim Earnings	2,019.01
Net back pay	3,513.79
Interest	566.21

5. Fifth Quarter, 7/1/83 to 9/30/83

Gross back pay	\$5,617.92
Interim Earnings	2,868.58
Net back pay	2,749.34
Interest	367.05

6. Sixth Quarter, 10/1/83 to 12/31/83

Gross back pay	\$5,532.80
Interim Earnings	1,000.00
Net back pay	4,532.80
Interest	479.13

7. Seventh Quarter, 1/1/84 to 3/31/84

Gross back pay	\$5,532.80
Interim Earnings	2,500.00
Net back pay	3,032.80
Interest	237.19

8. Eighth Quarter, 4/1/84 to 6/30/84

Gross back pay	\$5,617.92
Interim Earnings	2,500.00
Net back pay	3,117.92
Interest	158.12

9. Ninth Quarter, 7/1/84 to 9/30/84

Gross back pay	\$5,617.92
Interim Earnings	3,000.00
Net back pay	2,617.92
Interest	60.78

Gross back pay	\$4,341.12
Interim Earnings	3,612.75
Net back pay	728.37
 TOTAL net back pay due	 \$32,039.50
TOTAL Interest due	4,517.79
 TOTAL	 \$36,557.29

ATTORNEYS FEES AND EXPENSES

Section 105(c)(3) of the Act provides that "when an order is issued sustaining the Complainant's charges a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the complainant for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation." Three issues are raised in this case: (1) the appropriate hourly rate; (2) the hours reasonably expended by the attorneys for Complainant; (3) whether all the hours expended represented attorney's work and whether the attorneys were properly compensated at the appropriate hourly rate.

A. THE APPROPRIATE HOURLY RATE

The appropriate hourly rate is the rate prevailing for similar work in the community where the attorneys practice law. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980). It may, however, vary, depending on such factors as the kind of work involved, the experience and skill of the attorneys, the complexity and difficulty of the case, the results obtained, the undesirability of the case, and whether the fee is contingent or fixed. The attorneys for Complainant are requesting approval of an hourly rate of \$75 for legal services performed in connection with the case. Respondents contend that \$75 per hour is unreasonably high and should be drastically reduced. Respondents submitted a copy of a survey conducted by the Kentucky Bar Association showing that in the counties in which

Complainant's attorneys are located, approximately 73 percent of the responding attorneys charged less than \$60 per hour, while less than 7 percent charged more than \$75 per hour. They also submitted an affidavit from an attorney in Harlan County, Kentucky to the effect that \$45 to \$55 per hour is "a reasonable rate for attorneys with experience of those working for the Appalachian Research and Defense Fund of Kentucky, Inc." Complainant's attorneys submitted affidavits detailing their education and experience; and affidavits from four attorneys in Eastern Kentucky to the effect that \$75 per hour is a reasonable rate for discrimination cases under the Mine Safety Act.

Mr. Sanders has been a member of the Kentucky Bar since 1978; Mr. Oppegard since 1980. Both have had extensive experience in mine safety matters and in other matters involving employee rights. The Court of Appeals in Johnson, supra, stated that a young attorney who has demonstrated skill and ability should not be penalized because he only recently was admitted to practice. I believe this case was complex, legally and factually. It was hard - fought and complicated by the Respondents' failure or inability to cooperate in discovery. The Complaint had been investigated by the Labor Department and rejected. Based on all these factors, I conclude that \$75 is a reasonable hourly rate for the hours reasonably expended by Complainant's attorneys in this case.

HOURS REASONABLY EXPENDED

Respondents object to Complainant's claim for attorney fees and expenses because (1) much of the work for which compensation is claimed is not strictly legal work and should not be billed at the attorney's hourly rate; (2) the two attorneys for Complainant have in some instances both performed work which could have been performed and billed by one of them; (3) much of the work performed was unnecessary; (4) the total fee requested is wholly disproportionate to

The Court of Appeals in Johnson v. Georgia Highway Express, supra, at page 717 stated: "It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it."

A substantial portion of the work described in the Statements of Attorneys' Fees and Expenses appears to be "non-legal work" as described above. I conclude that the work described in the statements as interviewing witnesses (when it is or appears to be part of investigation rather than preparing for trial), contacts with MSHA or State mining officials and the Safety Academy, reviewing documents, talking with possible or potential witnesses, serving subpoenas, and inspecting reports is non-legal work. My review of the statements shows that 50.7 of the 411 hours billed by Mr. Oppegard between December 5, 1982 and June 5, 1984, were for such work; 7 of the 160.5 hours billed by Mr. Sanders from May 12, 1983 to April 19, 1984, were for such work; 38.9 of the 47.8 hours billed for joint work between May 11, 1983 and September 9, 1983, were for such work; 16.1 of the 191.9 hours billed in Mr. Oppegard's supplemental statement were for such work; 4 of the 102.8 hours billed in Mr. Sanders supplemental statement were for such work. I judge this work to be properly billable at \$25 per hour. The total hours affected is 116.7. The reduction in the fee because of this factor is thus, \$5,835.

B. DUPLICATION OF WORK

As the Court said in Copeland, supra, at 891, ". . . where three attorneys are present at a hearing when one would suffice, compensation should be denied for the excess time."

hourly rate of only one attorney for such work. It has been a difficult matter to decide whether the presence of two attorneys at the hearings and depositions was reasonably necessary. I conclude that it was not, and that the time of only one attorney is properly billable at attorney's fee rates. The presence of the second attorney was of value, however, and I will allow billing at the rate of \$25 per hour for the services of the second attorney. Further, where each attorney has billed at the rate of \$75 per hour for discussions in person or by phone with each other, I have reduced the total billable rate to \$100 for both attorneys. (Not all of the discussions between counsel are billed by both). The following items in the statements are affected:

1. Oppegard Statement 8/11/83;
Sanders Statement 8/11/83.
I conclude that 2 hours
were billed by each for
discussions
2. Oppegard Statement 1/7/84, .
item: Phone conversation
with Steve; Sanders Statement
1/7/84, item: phone call to
Tony. One-half hour billed
by both for discussion
3. Oppegard Statement 8/15/84;
Sanders Statement 8/15/84
One-half hour billed by both
for discussion
4. Oppegard Statement 10/19/84,
Sanders Statement 10/19/84.
One hour was billed by both
for discussion

Sanders Statement 8/15/83;
8 hours billed by both for
depositions.

6. Oppegard Statement 9/8/83;
Sanders Statement 9/8/83.
8 hours billed by both for
hearing.
7. Oppegard Statement 9/9/83;
Sanders Statement 9/9/83.
3 hours billed by both for
hearing.
8. Oppegard Statement 1/11/84;
Sanders Statement 1/11/84.
5 hours billed by both for
hearing.
9. Oppegard Statement 1/12/84;
Sanders Statement 1/12/84.
7 hours billed by both for
hearing.
10. Oppegard Statement 10/15/84;
Sanders Statement 10/15/84.
6.5 hours billed by both for
depositions.
11. Oppegard Statement 10/24/84;
Sanders Statement 10/24/84.
7.5 hours billed by both for
hearing.

Thus a total of 49 hours were
billed at \$150 per hour (75 per
hour for each attorney) for
this partially duplicated work.
I judge that the fee is \$50 per
hour too high. The reduction
in fee because of this factor
is \$2,450.

C. NECESSARY LEGAL WORK

Respondents contend that the number of
hours charged by counsel for discovery, and
for the preparation of briefs was excessive

part of the discovery undertaken by Complainant resulted from and was made necessary because of Respondents' lack of cooperation and the absence of adequate records and documents. However, I agree with Respondents that some of the extraordinary amount of time devoted to discovery was unnecessary and unproductive, and that the amount of time devoted to the posthearing brief was excessive. Mr. Oppegard billed for 102.7 hours and Mr. Sanders for 36 hours in preparing the brief subsequent to the January 1984 hearing. Mr. Oppegard billed for 33 hours and Mr. Sanders for 19 hours following the October 1984 hearing. I will reduce by 50 the number of hours allowed for discovery and other trial preparation, and will reduce from 190.7 hours to 150 hours, the allowable and billable time for preparation of briefs. Therefore, the reduction in fee because of this factor is \$6,802.50

D. DISPROPORTION BETWEEN RECOVERY AND FEES REQUESTED

Respondents argue that the fees requested are "wholly disproportionate to Complainant's claim for back pay and interest of \$36,557.29. . . ." This overlooks the fact that Complainant was awarded job reinstatement as well as back pay and interest. The amount recovered as back pay does not determine the reasonableness of the fee request. See Copeland, supra, at 906-908.

The total fees requested amount to \$69,550. I am deducting \$15,087.50 and approving fees in the amount of \$54,462.50.

EXPENSES

Complainant's attorneys have requested reimbursement the amount of \$2,616.72 for expenses, including mileage, copying, witness fees and service fees, telephone calls, transcripts. Respondents object to these expenses, but my review of the statements persuades me that they are reasonable. Reimbursement for the expenses will be allowed.

ORDER

1. Respondent Jackson is ORDERED to reinstate Complainant to the position he held on September 20 1982, or to a similar position at the same rate of pay and with the same employment benefits.

2. Respondents Kenta and Jackson are ORDERED to pay Complainant the sum of \$36,557.29 for back wages and interest through December 17, 1984. They are FURTHER ORDERED to pay to Complainant back wages at the rate of \$425.60 per week with interest, less interim earnings from December 17, 1984, until he is reinstated.

3. Respondents Kenta and Jackson are ORDERED to pay Complainant's attorneys the sum of \$54,462.50 as attorneys fees and \$2,616.72 for expenses of litigation.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Tony Oppegard, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., 104 Morgan Street, Hazard, KY 41701
(Certified Mail)

Stephen A. Sanders, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., 205 Front Street, Prestonsburg, KY 41653 (Certified Mail)

Steven D. Cundra, Esq., and Michael R. Gottfried, Esq., Thompson, Hine and Flory, 1920 N Street, N.W., Washington, DC 20036 (Certified Mail)

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FEB 2, 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No: CENT 84-26-M
Petitioner	:	A.O. No: 41-01472-05503
	:	
v.	:	Deweyville Dredge & Plant
	:	
	:	
SPECIALTY SAND COMPANY, INC.,	:	
Respondent	:	

DECISION

Appearances: Robert A. Fitz, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas,
for Petitioner;
Mr. W.A. Keckley, President, Specialty Sand
Company, Houston, Texas, for Respondent

Before: Judge Moore

At the commencement of the hearing the attorney for the Mine Safety and Health Administration announced that the parties had agreed to a settlement of the case. He and Mr. Keckley for Respondent explained on the record why a settlement had not been reached until the morning of the trial. Mr. Keckley misunderstood the Notice of Hearing and thought he would be appearing at a conference or meeting. In the Solicitor's office the matter had been handled by two different attorneys and there was probably a communication problem. At any rate, the government was of the opinion that the negligence factor was not so high as it originally thought. The government introduced government Exhibit 2 which shows that during a two-year period respondent had only 15 citations issued to it and all of them were non-S&S.

After listening to a brief description of the evidence as found the day after the accident, I agreed to a settlement in the amount of \$2,850. The original assessment was \$3,800.

Respondent is accordingly ORDERED to pay to MSHA, within 30 days, a civil penalty in the amount of \$2,850.

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Robert A. Fitz, Esq., Office of the Solicitor, U.S. Department
of Labor, 555 Griffin Square Building, Dallas, TX 75202
(Certified Mail)

Mr. W.A. Keckley, President, Specialty Sand Company, Inc.,
P.O. Box 9877, Houston, TX 77015 (Certified Mail)

/db

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 84-49-M
Petitioner	:	A.C. No. 42-01572-05502
	:	
v.	:	Sorenson Pit
	:	
WESTERN ROCK PRODUCTS	:	
CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
No appearance for respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq.

After notice to the parties, a hearing commenced on December 5, 1984 in Las Vegas, Nevada.

At the commencement of the hearing counsel for the Secretary advised the judge that the parties had reached an amicable settlement.

The citations, the standards allegedly violated, the initial assessments, and the proposed dispositions are as follows:

<u>Citation No.</u>	<u>30 CFR Section Violated</u>	<u>Assessed Penalty</u>	<u>Disposition</u>
2083838 A	56.12-32	\$500	\$120
2083838 B	56.12-8	400	120
2083838 C	56.12-13(b)	300	120
2083838 D	56.4-12	250	120
2083838 E	56.12-18	200	120

In support of the motion to reduce the proposed penalties the Secretary states that his Office of Assessments failed to give full credit for respondent's prior history.

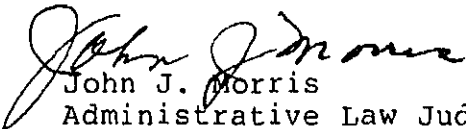
ORDER

1. The settlement agreement is APPROVED.

2. The following citations and penalties, as noted, are AFFIRMED.

<u>Citation No.</u>	<u>Penalty</u>
2083838 A	\$120
2083838 B	120
2083838 C	120
2083838 D	120
2083838 E	120

3. Respondent is ordered to pay to the Secretary the sum of \$600.00 within 40 days of the date of this decision.


John J. Morris
Administrative Law Judge

Distribution:

Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294 (Certified Mail)

Mr. Darrell G. Whitney, Western Rock Products Corporation, P. Box 856, Cedar City, Utah 84720 (Certified Mail)

/blc

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 84-55-M
Petitioner : A.C. No. 08-00395-05506-A
v. :
: Gall Silica Mining Company
ANTHONY T. HARE, : Inc., No. 2 Mine and Pla
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

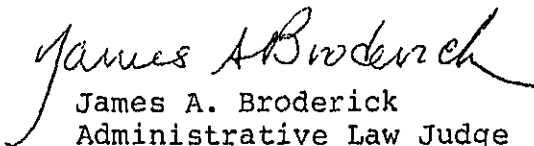
On February 26, 1985, the Secretary of Labor filed a motion for approval of a settlement reached by the parties in this case. The violations were originally assessed at \$400 and the parties propose to settle for \$300.

Respondent was charged as the agent of Gall Silica Mining Company, a corporate mine operator, with knowingly authorizing, ordering or carrying out the two violations of 30 C.F.R. § 56.9-3. The violations alleged were operating two front-end loaders without brakes. The corporate operator paid penalties of \$350 and \$250 for the two violations

The motion proposes a settlement in the case against Respondent whereby, Respondent would pay \$200 (the amount assessed) and \$100 for the violations charged. The second alleged violation occurred on level, soft ground and there was little or no foot traffic in the area. For these reasons, the penalty proposed was reduced.

I have considered the motion in the light of the criteria in section 110(i) of the Act, and conclude that the settlement should be approved.

Accordingly, the settlement is APPROVED and Respondent is ORDERED TO PAY the sum of \$300 within 30 days of the date of this decision.


James A. Broderick
Administrative Law Judge

J. Philip Smith, Esq., Office of the Solicitor, U.S. Department
of Labor, 4015 Wilson Boulevard, Arlington, VA 22203
(Certified Mail)

Mr. Anthony T. Hare, Gall Silica Mining Company, Inc.,
1901 Highway 60 East, P.O. Box 1680, Lake Wales, FL
33859-1680 (Certified Mail)

/fb

MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 84-50-M
Petitioner	:	A.C. No. 42-01833-05505
	:	
v.	:	Delta Pit
	:	
WESTERN ROCK PRODUCTS	:	
CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
No appearance for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq.

After notice to the parties, a hearing commenced on December 5, 1984 in Las Vegas, Nevada.

At the commencement of the hearing counsel for the Secretary advised the judge that the parties had reached an amicable settlement.

The citations, the standards allegedly violated, the injury assessments, and the proposed dispositions are as follows:

<u>Citation No.</u>	<u>30 CFR Section Violated</u>	<u>Assessed Penalty</u>	<u>Disposition</u>
2008016	56.12-25	\$98	\$56
2008017	56.4-10	20	20
2008019	56.12-25	98	56
2083820	56.12-28	20	20
2083944	56.4-2	20	20
2083948	56.4-12	20	20
2083949	56.12-25	68	56
2083983	56.12-25	98	56
2083950	56.9-6	54	56
2083982	56.12-1	20	20

2083983, the Secretary states his Office of Assessments failed to give full credit for respondent's prior history. Accordingly, the proposed assessments for those citations should be reduced.

The remaining citations are essentially in accordance with the Secretary's evaluation and the penalties, as originally assessed, should be affirmed.

The proposed settlement is in order and it should be approved.

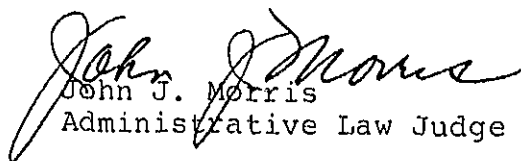
Accordingly, I enter the following:

ORDER

1. The settlement agreement is APPROVED.
2. The following citations and penalties, as noted, are AFFIRMED.

<u>Citation No..</u>	<u>Penalty</u>
2008016	\$56
2008017	20
2008019	56
2083820	20
2083944	20
2083948	20
2083949	56
2083983	56
2083950	56
2083982	20

3. Respondent is ordered to pay to the Secretary the sum of \$380 within 40 days of the date of this decision.


John J. Morris
Administrative Law Judge

Distribution:

Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

ADMINISTRATION (MSHA), : Docket No. WEST 84-51-
Petitioner : A.C. No. 42-01833-0550
:
v. : Delta Pit
:
WESTERN ROCK PRODUCTS :
CORPORATION, :
Respondent :

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
No appearance for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq.

After notice to the parties, a hearing commenced on December 5, 1984 in Las Vegas, Nevada.

At the commencement of the hearing counsel for the Secretary advised the judge that the parties had reached an amicable settlement.

Citation 2083812 alleges respondent violated 30 C.F.R. § 56.20-8(a) and the Secretary originally proposed a penalty of \$20.

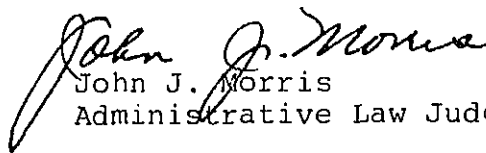
Counsel for the Secretary advised the judge that the respondent has agreed to pay the proposed penalty.

The proposed settlement is in order and it should be approved.

Accordingly, I enter the following:

ORDER

1. The settlement agreement is APPROVED.


John J. Morris
Administrative Law Judge

Distribution:

Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Mr. Darrell G. Whitney, Western Rock Products Corporation, P.O. Box 856, Cedar City, Utah 84720 (Certified Mail)

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 84-54-M
Petitioner	:	A.C. No. 42-01833-05507
	:	
v.	:	Delta Pit
	:	
WESTERN ROCK PRODUCTS	:	
CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
No appearance for respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq.

After notice to the parties, a hearing commenced on December 5, 1984 in Las Vegas, Nevada.

At the commencement of the hearing counsel for the Secretary advised the judge that the parties had reached an amicable settlement.

The citations, the standards allegedly violated, the assessments, and the proposed dispositions are as follows:

Citation No.	30 CFR Section Violated	Assessed Penalty	Disposition
2083947 A	56.12-25	\$500	\$500
2083947 B	56.12-8	500	500
2083947 C	56.12-8	200	200
2083947 D	56.12-8	200	200
2083947 E	56.12-8	200	200
2083947 F	56.12-8	200	200
2083947 G	56.12-25	500	500
2083947 H	56.12-25	500	500
2083947 I	56.12-2	700	700

Accordingly, I enter the following:

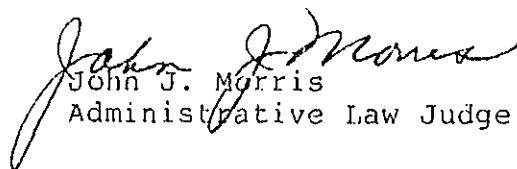
ORDER

1. The proposed settlement agreement is APPROVED.

2. The following citations and penalties, as noted, are AFFIRMED:

<u>Citation No.</u>	<u>Penalty</u>
2083947 A	\$500
2083947 B	500
2083947 C	200
2083947 D	200
2083947 E	200
2083947 F	200
2083947 G	500
2083947 H	500
2083947 I	700

3. Respondent is ordered to pay to the Secretary the \$3,500 within 40 days of the date of this decision.


John J. Morris
Administrative Law Judge

Distribution:

Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294 (Certified Mail)

Mr. Darrell G. Whitney, Western Rock Products Corporation, Box 856, Cedar City, Utah 84720 (Certified Mail)

/blc

February 28, 1985

MARION L. ADAMS,	:	DISCRIMINATION PROCEED
Complainant	:	
	:	Docket No. YORK 84-15-
v.	:	
	:	MD 84-23
J. L. OWENS III, CONTRACTING	:	
a/k/a J. L. OWENS III,	:	Eastern Aggregate Mine
a/k/a EASTERN AGGREGATES,	:	
INC.,	:	
Respondent	:	

DECISION

Appearances: Timothy D. Murnane, Esq., Davidsonville, Maryland, for Complainant;
William E. Kirk, Esq., Annapolis, Maryland Respondent.

Before: Judge Merlin

This case is a complaint filed under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) by Marion L. Adams against J. L. Owens III Contracting, Inc., (also known as Eastern Aggregates, Inc. J. L. Owens III) alleging that the discharge of Mr. Adams April 27, 1984 was a discriminatory act in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1) (hereinafter called "the Act").

Sections 105(c)(1) and (3) of the Act, 30 U.S.C. § 815(c)(1) and (3), provide in pertinent part as follows:

(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint

miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

* * * * *

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement

become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 106. Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a).

There is now a well defined body of law setting forth the principles which govern discrimination cases under the Act. In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981) and Secretary on behalf of Robinette v. United Castle Coal Co., FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in an event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Baro v. Magma Copper Co., 4 FMSHRC 1935, 1936-1938 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also

National Labor Relations Board's virtually identical analysis of discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., ____ U. S. ____, 76 L.Ed. 2d 667 (1983).

The plant in this case is an outdoor plant where raw materials are dug out of the ground and sent over a series of belt and conveyors where they are separated into different types of products such as two-inch gravel, peat gravel, Class A concrete sand and wash mason sand. The materials move through the different processes until smaller and smaller pieces are obtained (Vol. I, p. 76). The complainant was hired by the operator in November 1977 as a truck driver for this sand and gravel processing operation (Vol. II, p. 10). He was involved in 3 motor vehicle accidents in 1979 and 1980 (Vol. II, pp. 11-16). He was not reprimanded or otherwise disciplined for these incidents but because of them was transferred to the plant on March 11, 1981, where he became the plant operator (Vol. I, p. 53; II, pp. 16-17). His duties were to regulate the flow of raw material onto the main feed belt from the hopper, to maintain the plant and its components, to control the shut down switch, to start the plant to clean up spilled materials, and assist in repairs (Vol. II, pp. 16-17; Exhibit L).

After becoming the plant operator, complainant was involved in a number of safety-related incidents. The complainant admitted that in March 1983 he turned the belt on while another worker was on it, throwing the worker off (Vol. I, pp. 174, 235; II, pp. 19-20). However, the shed where the switch was located had no windows and complainant could not see the belt when he turned on the switch (Vol. II, p. 19). On December 15, 1983, it is undisputed that he again turned the belt on while another employee was working on the belt (Vol. I, pp. 203, 207, 234; II, pp. 25-26). Here too, the lack of visibility is relevant. The operator's witnesses testified that on December 21, 1983 he flooded a ditch where the electrician was working but complainant said he could not remember this incident (Vol. I, pp. 135-136, 223, 225; II, p. 25). I accept the operator's evidence as more probative and find this last event occurred. However, I also accept complainant's uncontradicted testimony that no one reprimanded or reproved him about any of these incidents and that on December 23, 1983 he received a \$300 Christmas bonus (Vol. I, pp. 25-27).

mistakenly turned the power on or twisted up some wires (Vol. I, pp. 137-139; II, pp. 33-36). No one said anything to him at the time about this incident (Vol. II, pp. 33-36).

The operator's witnesses explained that complainant was not spoken to about the foregoing incidents until the middle of 1984 because his wife was ill (Vol. I, pp. 77-78). The record does not indicate how long complainant's wife had been ill but apparently she was very sick on December 5, 1983 and died sometime thereafter (Vol. II, pp. 49-50). The operator's failure to reprimand or otherwise take action against complainant is undoubtedly due to the fact that by all accounts he was not a very good employee who was on time, never absent and worked hard (Vol. I, pp. 58, 71, 236-237, 256). Sometime around the middle of April 1984 the owner and the superintendent spoke to complainant about safety. Although it is nowhere expressly stated, it is clear from the record that by this time complainant's wife had died (Vol. I, pp. 243-244). The complainant testified that the only specific incident brought up was that in March 1983 when another worker was thrown off the belt (Vol. II, p. 32). The owner did not specify exactly what was talked about but stated that when the conversation was over he patted complainant on the back and left him with the idea that things would straighten out (Vol. I, p. 83).

The superintendent testified that on April 23, 1984 complainant backed a truck into a wash rack (Vol. I, p. 223). Since this testimony is uncontradicted, I accept it. There is also testimony on behalf of the operator that complainant started up the plant and a rock came out of the chute almost hitting another worker (Vol. I, pp. 88-90, 244-245). The complainant testified that this could have happened but he did not remember (Vol. II, pp. 37-38). I find more definite and more probative evidence which indicates that this event occurred. There is however a dispute between the operator's witnesses over when this last event occurred since the owner testified it happened a few days before complainant's discharge and before his conversation with the superintendent whereas the superintendent stated it happened on April 24 after the conversation but a few days before the discharge (Vol. I, pp. 89-90, 244). I credit the owner's testimony and find this incident happened sometime before the conversation and discharge.

superintendent gave him slips of paper to put in complainant's personnel file (Vol. I, pp. 192, 195-198; Exhibits C-J). However, the superintendent testified that the safety director did not tell him until December 1983 to start keeping records on complainant (Vol. II, pp. 220-221). He said that before late 1983, he went by his calendar book (Vol. I, p. 241). According to the superintendent the slips of paper regarding each of complainant's alleged accidents (Exhibits C-J) were based upon his daily records (Court Exhibit 1). But only the daily record book for 1984 was submitted to support the notes. Nothing was introduced to support the notes allegedly relating to incidents in 1983. Exhibit F is a note relating to an alleged accident on June 8, 1983 with respect to the sand classifier. The complainant denies this happened and none of the operator's witnesses testified about it. The note is therefore rejected as evidence of the event which I find did not happen. Indeed, this note's existence in the same form as the others casts additional doubt upon the probity of all the notes. The complainant's credibility is enhanced by his candid admissions regarding the occurrence of most of the events. Finally, the contemporaneous keeping of these notes is wholly inconsistent with the operator's admitted failure to speak to complainant about any of the incidents described therein. The notes constitute nothing more than an after the fact attempt to justify the dismissal.

In addition, the superintendent's 1984 daily record book itself is suspect in many respects (Court Exhibit 1). For example, the entry on April 24, 1984 regarding complainant's starting up of the plant is obviously a subsequent addition squeezed in between entries already on the page and made with a different pen. This suspect entry is the basis for the superintendent's note regarding April 24, 1984 (Exhibit J). But the note contains information about a falling rock that the supposedly supporting day-book entry does not have. I find both the note and the entry unpersuasive. Moreover, the plant manager who is complainant's immediate supervisor, testified that he had never seen the superintendent's records and did not even know the superintendent was keeping them, whereas the superintendent said exactly the opposite. I believe the plant manager on this point (Vol. I, pp. 167-168, 226). Finally, the entries before April are very sketchy and become detailed only a few weeks before complainant's discharge.

to provide a basis upon which the discharge could be defended. The safety director's report (Exhibit 1) based upon the notes therefore, worthless. I further find that the superintendent keep a contemporaneous daily record book for 1984 (Court Exhibit 1) but that the entries only became detailed shortly before the discharge, that there are few entries regarding safety and that the book was never seen by complainant's immediate supervisor. Clearly, therefore, the book is not entitled to the significance regarding safety incidents that the operator would ascribe to it.

We now turn to the temporary wiring incident. On April 2, 1984, a wire had burned out and temporary wiring was installed until the electrician could make a permanent repair. The route of the temporary wire is undisputed. The wire ran from a power box inside the powerhouse through a hole in the trough which had wires, out through a hole between the wall and roof of the powerhouse to a steel support on the main hopper, then into the steel framework of the conveyor belt between the carrier rollers and the turn rollers, and then to a steel pipe around which it was wrapped, and finally down to an open connection box which was next to a water ditch in an area that was subject to flooding (Vol. I, pp. 128-130; II, pp. 44-46). The operator's safety director admitted that the plant manager and plant superintendent told him that the wire was strung as shown by pictures taken by complainant and admitted into the record (Vol. I, p. 129, Exhibit 11 pp. 1-3). The superintendent said he wound black tape around the wire where it passed through metal but complainant said there was no such tape (Vol. I, pp. 270-272; II, pp. 42-43, 93). The pictures do not show black tape (Exhibit 11 pp. 1-3). I find there was no black tape.

It is undisputed that complainant immediately complained to his immediate supervisor, the plant manager, about the temporary wiring because it was unsafe (Vol. I, pp. 49, 51, 179, 183, 186-187, 250, II; pp. 46, 63-64). The complainant threatened to call the Mine Safety and Health Administration (Vol. I, pp. 49, 51, 179, 183, 186-187, 250; II, pp. 46, 63-64). He testified that he was afraid debris from the belt might hit the wire and cause it to fall on the wet ground, creating a danger of electrocution (Vol. II, pp. 54-56). The plant manager told the superintendent and the owner about complainant's dissatisfaction with the wiring and his threat to call MSHA (Vol. I, pp. 51, 179).

Vol. I, pp. 11-12, 13, pp. 40-41). The owner and the superintendent testified that complainant's complaint and threat to MSHA was further evidence of his bad attitude (Vol. I, pp. 525-259, 287).

The complainant's fears about the temporary wiring and his expressed desire to call MSHA fall squarely within the terms of the Act. Section 105(c)(1), quoted *supra*. Consolidation Coal Co. v. Marshall, *supra*. In addition, it is clear that complainant had a reasonable good faith belief that a hazard existed. Robinette v. United Castle Coal Co., *supra*. After serving the complainant's demeanor when testifying, there can be no doubt about the sincerity of his belief that the temporary wiring was dangerous. Also, his perception of the danger was reasonable under the circumstances. Indeed, the overwhelming weight of the evidence demonstrates that the temporary wiring was very hazardous. An electrical expert who testified on behalf of complainant, analyzed the danger from the temporary wiring at length. He explained how the wire could become chafed from vibration or be hit by a rock, wearing away the insulation so that the live wire touching the steel frame of the conveyor, could electrify the entire frame and electrocute anyone who came in contact with it (Vol. II, pp. 78-79). As the expert pointed out, the structure was not grounded because it was set in concrete which is an insulator, not a ground (Vol. II, p. 85). The electrical current was one hundred times more than enough to kill someone and was very unsafe and tremendously dangerous (Vol. II, pp. 84, 86, 88). According to the expert it most certainly was enough to worry anyone who saw it (Vol. II, pp. 88-89). I recognize that the expert did not actually see the plant but he heard all the testimony describing how the temporary wire was hung and he saw the pictures which the operator's safety director agreed accurately represented the wiring. This provided more than enough foundation for his expert opinion. The MSHA inspector also expressed the view there was a danger of electrocution (Vol. I, pp. 114-115). The testimony of the operator's electrician attempting to deny the wiring was dangerous is unpersuasive (Vol. I, pp. 144-148). And even he finally admitted that "in time" vibration would pop the insulation so that the superstructure (if it was not grounded, which it was not) would be hot (Vol. I, p. 151). In light of the foregoing, I find the

...gine. His complaint and expressed desire to call MSHA constituted protected activity under the Act.

In addition, it is uncontroverted that the safety complaint and threat to call MSHA played a part in the discharge. As set forth above, both the owner and complainant testified that the temporary wiring incident was the precipitating factor in the discharge (Vol. I, pp. 55-57; II, pp. 46-47). Indeed, this circumstance permeates the record so pervasively, it needs no elaboration. I conclude therefore, that the complainant has made out a prima facie case.

In accordance with applicable Commission precedent, cited above, the operator may still prevail if it can show that it was also motivated by complainant's unprotected activities and would have discharged him in any event for these activities alone. As already set forth, I have found that a number of safety incidents in which the complainant was involved, did occur. However, I conclude that they played no part in the discharge. By his own account, the owner refused to do anything when his supervisory staff allegedly recommended adverse action against complainant because of the accidents (Vol. I, p. 55). 1/ Moreover, no one even spoke to the complainant about these incidents until the middle of April 1984, shortly before the discharge. The operator explained that it did not speak to the complainant until then because his wife was ill. This is accepted to the extent that the illness was one reason of several for not talking to him about the incidents. The fact that complainant was a very good employee also accounted for the operator's failure to act on the incidents. Moreover, the owner testified that at the end of the April 1984 conversation he patted complainant on the back and left him with the idea things would straighten out (Vol. I, p. 83). If the owner knowingly left complainant with this impression, presumably the owner sincerely felt that way himself as shown by his pat on the back. Except for the temporary wiring, the only incident which occurred between the conversation and the discharge was when complainant backed the loader into

1/ The operator's witnesses alleged that this recommendation was made about six months prior to the discharge (Vol. I, pp. 5208, 242). However at the time, i. e., October 1983, there had only been one recorded safety lapse by the complainant at the plant. I find this recommendation was made shortly before the discharge.

Only when complainant expressed dissatisfaction with wiring and threatened to call MSHA was the harshest of act discharge, taken against him. The operator's repeated leniency with respect to safety lapses, in stark contrast to what was about the wiring complaint demonstrates that the complaint threat to call MSHA constituted the sole reason for discharge. One only had to hear the indignation in the owner's recitation of events to realize that the complaint and threat were viewed as an unforgiveable betrayal by an employee the operator believed had treated well. For this perceived betrayal the complainant was fired.

The operator's argument that the complaint about the wiring was further evidence of complainant's "bad attitude" is without merit. First, the complaint and threat to call MSHA about temporary wiring are entirely different from the safety accidents. The accidents show some carelessness by complainant although already noted, lack of visibility which was the operator's responsibility was partly to blame in some instances. The temporary wiring complaint on the other hand demonstrates that in a serious situation complainant was safety conscious. In any event, the operator cannot treat a good faith and reasonable safety complaint as evidence of a "bad attitude", justifying adverse action. The operator well may have been lenient and indulgent towards complainant in prior situations. But in this case him for complaining and threatening to call MSHA about the temporary wiring the operator did exactly what the Mine Safety Act forbids.

In light of the foregoing, I conclude that the operator failed to rebut the complainant's prima facie case.

I therefore, conclude the operator discriminated against complainant in violation of the Act.

I have reviewed the briefs submitted by both parties. To the extent that they are inconsistent with this decision, they are rejected.

Accordingly, it is Ordered that the complaint filed herein be Allowed.

It is further Ordered that complainant is entitled to back pay beginning April 27, 1984 together with interest thereon in accordance with the Commission-approved formula set forth in Secretary on behalf of Bailey v. Arkansas-Carbena Co., 5 F. 2d 2042 (December 1983).

on or before March 15, 1985 complainant submit a written statement of damages including all the necessary computations of interest and that complainant's counsel submit a petition for attorneys' fees.

It is further Ordered that the parties appear on March 21, 1985 at 10:00 a.m. so that an Order with respect to damages may be entered.

A large, stylized handwritten signature in black ink, reading "Paul Merlin". The signature is fluid and cursive, with a long horizontal stroke at the beginning and a large loop at the end.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Timothy D. Murnane, Esq., P. O. Box 125, Davidsonville, MD 21035
(Certified Mail)

William E. Kirk, Esq., Melridge Building, 700 Melvin Avenue,
Baltimore, MD 21401 (Certified Mail)

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